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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91192781
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 77/701134  
Published in the *Official Gazette* on July 28, 2009  
Mark: LIXALEV

Bayer HealthCare LLC, Opposer,  v.  Biogen Idec MA Inc., Applicant.	OPPOSITION NO. 91192781
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**BAYER HEALTHCARE LLC'S OPPOSITION TO  
APPLICANT'S MOTION FOR SUMMARY JUDGMENT**

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## **I. INTRODUCTION**

Applicant Biogen Idec MA Inc. (“Applicant” or “Biogen”) asserts in its Motion for Summary Judgment (“Motion”) that there is no likelihood of confusion between Applicant’s mark LIXALEV and Opposer Bayer HealthCare LLC’s (“Bayer’s”) mark ALEVE and, without offering a shred of evidence, asks the Board to grant it summary judgment on the issue of likelihood of confusion. In doing so, Applicant focuses almost exclusively on the similarity of the marks, ignoring or paying mere lip service to the other *DuPont* factors, *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973), and argues that LIXALEV and ALEVE are so dissimilar that it is entitled to judgment as a matter of law on that basis alone.

In the absence of any evidence, Biogen also cannot come close to meeting its high burden of demonstrating there are no triable issues of fact. Biogen’s contentions that there are no similarities in the visual, phonetic, or commercial impressions of the marks at issue are nothing more than baseless conclusions. Moreover, they are conclusions contradicted by common sense, Bayer’s evidence submitted herein, and the Board’s own case law recognizing, among other things, that words can be pronounced in a variety of different ways, that trademarks in particular have no rules of pronunciation, and that adding a prefix or word in front of another’s mark does not obviate a likelihood of confusion. Applicant cannot get a free pass merely by lopping off the silent final letter and placing a small prefix in front of Opposer’s strong and famous mark.

At the core of Applicant’s fallacious reasoning is its blind-sighted failure to acknowledge or even address in its Motion that a mark on which Bayer has spent [REDACTED] [REDACTED] in advertising, a mark that has been in widespread and ubiquitous use throughout the United States since at least 1994,<sup>1</sup> a mark that appears on packages in virtually every pharmacy,

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<sup>1</sup> Bayer, or its predecessors, have used the mark ALEVE in connection with pharmaceutical preparations since at least as early as 1988, but the introduction of the over-the-counter ALEVE product was in 1994.

supermarket and convenience store in the United States, and a mark that is recognized by █ % of consumers who are shown photos of common pain relief medications in the country, is famous. *See* Declaration of Leslie Perrell in Support of Bayer Healthcare LLC’s Opposition to Applicant’s Motion for Summary Judgment (“Perrell Declaration”) at ¶¶ 3, 6, 9. ALEVE is famous. *See* Declaration of Erich Joachimsthaler in Support of Bayer Healthcare LLC’s Opposition to Applicant’s Motion for Summary Judgment (“Joachimsthaler Declaration”) at ¶¶ 16-17. There is overwhelming evidence to prove it. While there are other factors, which will be discussed below, that create material issues of fact, this factor alone is sufficient to defeat Applicant’s unsupported Motion, influencing—as it does—the strength and degree of protection to be afforded Opposer’s mark. Similarly, the dearth of marks with any similarities to ALEVE for pharmaceutical products—another *DuPont* factor ignored by Applicant—also entitles ALEVE to particularly strong protection.<sup>2</sup>

As discussed below, Bayer also disputes, among other things, that the products are dissimilar (whether or not Applicant were to restrict use of its mark to prescription pharmaceuticals), that they travel in different channels of trade, and that the purchasers of Applicant’s products are indeed sophisticated. Applicant’s conclusory and unsupported statements to the contrary fail to provide a basis for summary judgment. Given the intensely factual nature of this case, Applicant’s failure to submit any evidence, and the many genuine issues of material fact that remain in dispute with respect to whether Applicant’s mark creates a likelihood of confusion, the Board should deny Applicant’s motion for summary judgment.

Finally, Biogen’s motion for summary judgment and its request that the Board dismiss Bayer’s Notice of Opposition completely ignore the fact that Bayer’s Notice of Opposition also asserts dilution as a basis for refusing registration of LIXALEV. Thus, Bayer’s Notice of

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<sup>2</sup> Certain of the *DuPont* factors, such as actual confusion and length of time of concurrent use, are not applicable in this case given that Applicant has not commenced use of LIXALEV.

Opposition cannot be dismissed on summary judgment even were the Board to find there is no triable issue of fact with respect to likelihood of confusion.

## **II. STATEMENT OF FACTS**

Bayer is one of the world's leading research and development companies dedicated to the discovery and manufacture of innovative products to improve human and animal health and well-being worldwide. Perrell Declaration at ¶ 2. Bayer, or its predecessors, have used the mark ALEVE in connection with pharmaceutical preparations since at least as early as 1988. *See* Declaration of Beth Goldman in Support of Bayer Healthcare LLC's Opposition to Applicant's Motion for Summary Judgment ("Goldman Declaration") at ¶ 2, attesting to and attaching as an exhibit Bayer's registrations for ALEVE, which show use of the ALEVE mark in 1988. When the ALEVE over-the-counter ("OTC") product was publicly launched in 1994, it rapidly became one of the most highly sought after OTC pain relievers [REDACTED]. Perrell Declaration at ¶ 3. ALEVE quickly became a famous mark, and that fame has continued unabated through the present. Since that launch, Bayer has spent [REDACTED] in national media advertising for ALEVE, including television ads which have played widely across cable and network channels during all parts of the day and program types (early morning, daytime, news, primetime, night, syndicated series, and sports). *Id.* at ¶ 4. Bayer's television ads for ALEVE even appeared during the Superbowl in 2006. *Id.* Bayer's advertising for ALEVE has generated [REDACTED] in sales. *Id.* at ¶ 6.

Bayer owns numerous registrations for the ALEVE mark, including an incontestable registration for ALEVE for anti-inflammatory, analgesic and antipyretic pharmaceutical preparations in Class 5, a registration for ALEVE for pharmaceutical antitussive-cold preparations; preparations for treating colds, and a registration for ALEVE-D for antitussive-cold preparations; preparations for treating colds (U.S. Registration Nos. 1,536,042, 3,287,780 and

3,719,030 respectively). *See* Goldman Declaration at ¶ 2, attesting to and attaching as an exhibit Bayer's registrations. ALEVE is an important mark to Bayer, and Bayer or its predecessors have filed 42 opposition proceedings in front of the Board to prevent any similar marks for pharmaceutical products from registering. *Id.* at ¶ 3. Bayer's efforts to protect its huge investment in ALEVE and the recognized strength of that mark have kept similar marks from being registered for pharmaceutical products. *Id.*

On March 7, 2009, Biogen filed an intent-to-use application for registration of LIXALEV for pharmaceutical preparations for the treatment of cardiovascular disorders (U.S. Serial No. 77/701,134). The LIXALEV application was published for opposition on July 28, 2009. Bayer filed an extension of time to file a notice of opposition which was granted on August 27, 2009. Bayer filed its Notice of Opposition on November 23, 2009. Biogen filed an answer on December 18, 2009. On October 7, 2010, Biogen filed a motion to amend its description of goods to add the word "prescription." The Board issued an order on October 15, 2010 deferring judgment on the proposed amendment of goods until final judgment or until the case is decided upon summary judgment. Bayer propounded three sets of discovery requests to Biogen on September 21, 2010. Biogen has failed to respond to any of Bayer's discovery requests as of the date of this opposition brief and has stated in an email that it does not intend to respond to Bayer's discovery. Goldman Declaration at ¶¶ 4-5.<sup>3</sup>

### **III. LEGAL STANDARD**

#### **A. Applicant Bears the Burden on Summary Judgment.**

Summary judgment is appropriate only when the moving party has shown that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

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<sup>3</sup> Bayer, while responding to this motion, reserves all rights to move to compel Biogen to respond to Bayer's discovery requests.

matter of law.” Fed. R. Civ. P. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The moving party bears the initial burden of proof, and must “inform the court of the basis of its motion . . . identifying those portions of the ‘pleadings, depositions, answers to interrogatories, and admissions on file’ which it believes demonstrates the absence of a genuine issue of material fact.” *Celotex Corp.*, 477 U.S. at 323 (citing Fed. R. Civ. P. 56(c)).

“In deciding a motion for summary judgment, the function of the Board is not to try issues of fact, but rather to determine if there are any genuine issues of material fact to be tried.” TBMP § 528.01. Moreover, “[t]he non-moving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist; and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the non-moving party.” TBMP § 528.01; *see also Lloyd’s Food Prods. Inc. v. Eli’s Inc.*, 987 F.2d 766, 25 U.S.P.Q.2d 2027 (Fed. Cir. 1993) (holding impermissible inferences against nonmovant). Bayer has a modest burden in the adjudication of the Motion, needing only to show that a genuine issue of material fact exists which would be sufficient to allow a reasonable trier of fact to decide the issue of likelihood of confusion in Bayer’s favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Opryland USA Inc. v. Great Am. Music Show*, 970 F.2d 847, 849-50 (Fed Cir. 1992).

“Because of the intensely factual nature of trademark disputes, summary judgment is generally disfavored in the trademark arena,” *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 184 F.3d 1107, 1109 (9th Cir. 1999), *on remand to*, 190 F.R.D. 667 (D. Or. 2000), *related reference*, 125 F. Supp. 2d 1269 (D. Or. 2001), *aff’d*, 304 F.3d 936, 64 U.S.P.Q.2d 1514 (9th Cir. 2002), and the issue of likelihood of confusion is routinely submitted to the trier of fact as a “question of fact,” *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1355 n.5 (9th Cir. 1985) (citations omitted). A “motion for summary judgment in trademark infringement cases must be approached with great caution,” *AHP Subsidiary Holding Co. v. Stuart Hale Co.*, 1 F.3d 611,

616, 27 U.S.P.Q.2d 1758, 1762 (7th Cir. 1993) (reversing summary judgment of dismissal), and summary judgment of dismissal in a trademark case is “the exception.” *Country Floors, Inc. v. Gepner*, 930 F.2d 1056, 1063, 18 U.S.P.Q.2d 1577, 1583 (3d Cir. 1991).

#### **IV. ARGUMENT**

##### **A. Applicant’s Motion Should Be Denied Because There Are Numerous Disputed Issues of Material Fact.**

Applicant has failed to meet its burden of showing a lack of any triable issue of fact with respect to a likelihood of confusion. There are numerous issues of material fact in dispute, including, but not limited to, whether the ALEVE mark is famous; the similarity of the marks based upon their appearance; the similarity of the marks based on their sound; the similarity of the marks based on their commercial impression; the similarity of the products; the similarity of the relevant markets in which the products move; and the sophistication of the buyers to whom sales are made. For this reason, the Board should deny Biogen’s motion.

##### **1. The Fame of the ALEVE Mark Is a Disputed Issue of Material Fact.**

ALEVE is distinctive and famous throughout the United States, and has become closely associated with Bayer’s goods. Bayer’s Notice of Opposition at ¶ 10. While Applicant has provided no evidence to the contrary in its motion, it has denied in its Answer that ALEVE is a famous mark. Applicant’s Answer to Notice of Opposition at ¶ 10.

Section 43(c)(2) of the Lanham Act, 15 U.S.C. § 1125 (2006), defines a mark as famous “if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark owner.” In determining whether a mark possesses the requisite degree of recognition, the Act directs courts to consider all relevant factors, including: (i) the duration, extent and geographic reach of advertising and publicity of the mark; (ii) the amount, volume, and geographic extent of sales of goods or services offered under the



mark; (iii) the extent of actual recognition of the mark; and (iv) whether the mark was registered under the Act. *Id.*

ALEVE satisfies all of the above requirements for establishing fame. Since its launch of the OTC ALEVE product in 1994, Bayer has expended [REDACTED] in national media advertising campaigns for the product. Indeed, Bayer has spent over [REDACTED] on advertising for ALEVE in the last three years alone. Perrell Declaration at ¶ 5. Products offered under the ALEVE mark have become enormously popular among the consuming public and are sold in pharmacies, supermarkets, and convenience stores throughout the United States. *Id.* at ¶ 6. Bayer's revenues from sales of its ALEVE products in 2010 alone are in the [REDACTED]. *Id.* According to data collected from an in-home diary panel by The National Consumer Panel Company, Aleve was purchased by [REDACTED] % of U.S. households in 2008 and [REDACTED] % of U.S. households in 2009. *Id.* at ¶ 8.

ALEVE has also achieved widespread brand recognition. *See* Joachimsthaler Declaration at ¶¶ 16-17. Bayer's continuous tracking research, which monitors consumer awareness and usage of OTC pain relievers, shows that [REDACTED] % of consumers recognize the ALEVE name when shown a photograph of common pain relief brands. Perrell Declaration at ¶ 9. Finally, Bayer owns numerous registrations for the ALEVE mark, including but not limited to, an incontestable registration for ALEVE for anti-inflammatory, analgesic and antipyretic pharmaceutical preparations in Class 5, a registration for ALEVE for pharmaceutical antitussive-cold preparations; preparations for treating colds, and a registration for ALEVE-D for antitussive-cold preparations; preparations for treating colds (U.S. Registration Nos. 1,536,042, 3,287,780 and 3,719,030 respectively). *See* Goldman Declaration at ¶ 2, attesting to and attaching as an exhibit Bayer's registrations.

Because ALEVE is a famous mark, the likelihood of confusion as to appearance, sound, or commercial impression is greater than it would be for a non-famous mark. The Federal

Circuit has made clear that famous marks enjoy a broader scope of protection than non-famous marks; fame is a catalyst that intensifies the similarities of marks under analysis:

The . . . fame of the prior mark plays a dominant role in cases featuring a famous or strong mark. Famous or strong marks enjoy a wide latitude of legal protection. . . . Thus, a mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark. . . . As a mark's fame increases, the Act's tolerance for similarities in competing marks falls. . . . The driving designs and origins of the Lanham Act demand the standard consistently applied by this court—namely, more protection against confusion for famous marks.

*Kenner Parker Toys, Inc. v. Rose Art Industr., Inc.*, 963 F.2d 350, 352-53, 22 U.S.P.Q.2d 1453, 1456 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 862 (1992); *see also Recot, Inc. v. Becton*, 214 F.3d 1322, 1327, 54 U.S.P.Q.2d 1894, 1897 (Fed. Cir. 2000) (“Famous marks are accorded more protection precisely because they are more likely to be remembered and associated in the public mind than a weaker mark . . . [W]e hold that the fame of the mark must always be accorded full weight when determining the likelihood of confusion.”); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1569-70, 218 U.S.P.Q. 390, 394 (Fed. Cir. 1983) (holding the fact that opposer's marks have acquired considerable fame weighs in its favor in determining likelihood of confusion).

The critical impact of fame on the likelihood of confusion analysis requires the Board to address this issue before it can rule on the case. Given Applicant's failure to provide any evidence showing ALEVE is not famous and the clear materiality of that issue, the fame of ALEVE is a “genuine issue of material fact to be tried” under TBMP § 528.01 and the Board should deny Applicant's Motion.<sup>4</sup>

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<sup>4</sup> Bayer's position that fame is a triable issue pertains to Applicant's motion for summary judgment, and Bayer reserves its rights to allege that there is no genuine issue of material fact disputing the fame of ALEVE in any summary judgment motion brought by Bayer later in this proceeding.

2. **The Similarity of the Appearance of the Marks Is a Disputed Issue of Material Fact.**

Applicant argues that “the marks at issue are patently dissimilar in appearance.”

Applicant’s Memorandum in Support of its Motion for Summary Judgment (“Memorandum”) at 6. In support of its argument, Applicant contends that because LIXALEV begins with “LIX” and does not end with an “E,” “there is no similarity in appearance between the two marks.” *Id.* This analysis is erroneous on its face. Applicant ignores that the major letter string and the majority of the letters in its own mark comprise most of the ALEVE mark.

Moreover, marks are to be viewed in their entireties to determine whether they are confusingly similar. *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 1570 (Fed. Cir. 1983) (stating that in determining whether there is a likelihood of confusion, an important factor is “the similarity or dissimilarity of the marks in their entireties” or when viewed “as a whole”). When viewed in their entireties, the marks LIXALEV and ALEVE are confusingly similar. While Applicant would have the Board focus on the fact that Applicant’s mark lacks the letter “E,” it cannot be disputed that LIXALEV incorporates almost the entirety of Opposer’s mark, sharing four of the five letters of ALEVE, namely, A-L-E-V, and dropping only the final silent “E.”

Applicant argues that the prefix “LIX” is sufficient to distinguish LIXALEV from ALEVE, but courts have repeatedly found that adding or changing a prefix does not obviate a likelihood of confusion. *See In re Kent-Gamebore Corp.*, 59 U.S.P.Q.2d 1373 (T.T.A.B. 2001) (finding likelihood of confusion between HI-IMPACT and IMPACT); *LaTouraine Coffee Co. v. Lorraine Coffee Co.*, 157 F.2d 115 (2d Cir. 1946) (LATOURAINE and LORRAINE); *Bookman v. Oakland Chemical Co.*, 40 F.2d 1006 (C.C.P.A. 1930) (PEROXOGEN and DIOXOGEN); *McKesson & Robbins, Inc. v. American Foundation for Dental Science*, 150 F.2d 420 (C.C.P.A.

1945) (CYTAMIN AND DENT-A-MIN); *G.D. Searle & Co. v. Pfizer & Co.*, 265 F.2d 385 (7th Cir. 1959) (BONAMINE and DRAMAMINE).

Moreover, the strength of the ALEVE mark will cause the “ALEV” portion of Opposer’s mark to be dominant. Because “LIX” does not exist as a prefix in the English language, consumers are likely to identify “ALEV” as the only familiar part of the word because it is shared with the well-known ALEVE brand. *See* Joachimsthaler Declaration at ¶ 30. As such, Dr. Joachimsthaler, an expert on brand strategy, predicts that consumers will perceive a high degree of similarity between the names ALEVE and LIXALEV, making it likely that they will confuse the two. *Id.* at ¶¶ 30-31. Courts have also held that because a well-known and famous part of a mark “will likely make the most impression on the ordinary viewer,” “that part will be treated as the dominant portion of conflicting marks and given greater weight in the comparison.” 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:45 (4th ed. 2008). *See also Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 899, 57 U.S.P.Q.2d 1617, 1622 (7th Cir. 2001) (finding a likelihood of confusion between BEANIE BABIES and BEANIE RACER for bean bag toys and stating that “the word ‘Beanie’ is a well-known and famous part of the [plaintiff’s] mark, rendering it the more salient portion of the mark and deserving greater weight than the surrounding elements”). Because a genuine issue of material fact exists regarding the similarity of the appearance of the marks, Applicant’s motion for summary judgment must be denied.

Applicant erroneously claims that the TTAB has found marks even more alike than the ones at issue here to be dissimilar. However, even a cursory analysis of the cases upon which Applicant relies shows that the marks involved in those cases are more easily distinguishable from each other than LIXALEV is from ALEVE. For example, Applicant cites *Missiontrek Ltd. v. Onfolio, Inc.*, 80 U.S.P.Q.2d 1381 (T.T.A.B. 2005), in which the Board found that the defendant’s mark ONFOLIO was not confusingly similar to plaintiff’s previously-registered

mark CARTAGIO and granted the defendant's motion for summary judgment. Applicant nonsensically argues that the marks in *Missiontrek* are even more similar to each other than LIXALEV is to ALEVE because they share identical two-letter suffixes. But the dissimilar parts of the *Missiontrek* marks comprise two of the three syllables of the marks, share no letters or even sounds in common, and join the final "IO" suffixes to the strong "l" and "g" sounds ("LIO" versus "GIO") which further distinguishes even the suffixes from each other. Moreover, the *Missiontrek* Court noted that "IO" is an ordinary English suffix found in numerous registered software marks. In contrast, LIXALEV incorporates Opposer's mark in its near-entirety; and "ALEV" is not an ordinary suffix found in many other registered pharmaceutical marks.

Likewise, Applicant also cites *Polaroid Corp. v. Oculens, Ltd.*, 196 U.S.P.Q. 836 (T.T.A.B. 1977), in which the court did not find confusing similarity between the registered mark POLAROID and the applicant's mark FILTEROID. *Id.* at 839-40. Once again, however, Applicant's reliance on this case for the proposition that the Board has found marks far more alike to be dissimilar is erroneous. As the *Polaroid* Court noted, the "only similarity [among the marks] lies in the suffix . . . , namely the term "OID" which is defined in Webster's New World Dictionary of the American Language as a 'forming suffix meaning like, resembling (crystalloid, metalloid)'." *Id.* at 839. "Accordingly, in view of the descriptive nature of this term, we can give it very little weight in a consideration of the marks as a whole." *Id.* The court also noted that the remaining portions of the respective marks, "FILTER" and "POLAR," "neither look or sound alike, nor do they have the same connotation." *Id.* In contrast, Applicant's mark shares nearly the entirety of Bayer's mark—"ALEV"—which is neither a common nor descriptive suffix, as is "OID." The remaining portion of Applicant's mark—LIX—comprises a meaningless and short prefix, which when added to Bayer's famous mark is insufficient to preclude confusion.

Finally, Applicant cites *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386 (Fed. Cir. 1989), in which the Court affirmed the Board's dismissal on summary judgment of an opposition by the owner of PECAN SANDIES to an application for registration of PECAN SHORTEES. While Applicant argues that "ALEVE and LIXALEV are even more distinct than the marks in *Keebler Co.* since they neither begin nor end with the same letters or the same sound," Applicant ignores that there are noticeable differences between the words "SHORTEES" and "SANDIES." For one, the sounds of the two marks are highly distinctive. The salient portions of the marks, "SHORT" and "SAND," bear no similarity whatsoever (the suffixes are common sounds for suggesting something diminutive, cute or nicknamed) and should therefore be given significantly less weight. Moreover, the two marks also have very different meanings. While SHORTEES references an ingredient, namely shortbread, SANDIES references a distinctive type of cookie. Thus, the two marks are more dissimilar than Applicant suggests.

Even more importantly, the cases upon which Applicant relies differ from the case at hand in that they do not involve pharmaceutical preparations. Courts have held that in the field of medical products, "it is particularly important that great care be taken to prevent any possibility of confusion in the use of trademarks." *Morgenstern Chem. Co. v. G. D. Searle & Co.*, 253 F.2d 390, 393 (3d Cir. 1958). This is because the consequences of confusion are "so much more serious" in the pharmaceutical field. *Syntex Labs., Inc. v. Norwich Pharmacal Co.*, 315 F. Supp. 45, 53 (S.D.N.Y. 1970), *aff'd* 437 F.2d 566 (2d Cir. 1971). As just two examples, the FDA reports that an 8-year old died after receiving methadone instead of methylphenidate and a 50-year old woman was hospitalized after taking Flomax, which treats an enlarged prostate, instead of Volmax, which relieves bronchospasm. Joachimsthaler Declaration at ¶ 33. This has led courts to conclude that "relief should be granted upon a lesser proof of confusing similarity in a prescription drug case than in other areas of infringement litigation." *Syntex Labs*, 315 F. Supp. at 53. *See also* 3 McCarthy, *supra*, § 23:32 ("[I]t is proper to require a lesser quantum of

proof of confusing similarity for drugs and medicinal preparations.”). In short, “[i]f there is any possibility of such confusion in the case of medicines[,] public policy requires that the use of the confusingly similar name be enjoined. *Morgenstern Chem. Co.*, 253 F.2d at 394.

Applicant relies on *Astra Pharm. Prods. v. Beckman Instrs., Inc.*, 220 U.S.P.Q. 786, 792 (1st Cir. 1983), but that case is inapposite and Applicant’s characterization of that case wrong. The case does not support the proposition that pharmaceuticals “are a broad category and differences in goods can be enough to preclude confusion” as claimed by Applicant. *See* Memorandum at 10-11. Rather, the case dealt with a “massive instrument weighing from 350 lbs to 550 lbs” on one hand and “local anesthetics, cardiovascular medicines, and prefilled syringes” on the other hand. *Astra Pharm Prods.*, 220 U.S.P.Q. at 790. Not surprisingly, the court found that “[t]he products involved in this case have few, if any similarities.” *Id.* In contrast, the goods under both Applicant’s and Bayer’s marks *are* pharmaceuticals.

**3. The Similarity of the Sound of the Marks Is a Disputed Issue of Material Fact.**

Applicant and Opposer also dispute the pronunciation of the mark LIXALEV. Applicant claims its mark is pronounced as “licks-ah-lehv” and proclaims that pronouncing it “licks-ah-leeve” “is contrary to any known and all reasonable readings and pronunciations” of LIXALEV. Memorandum at 7. Biogen’s sole support for this sweeping proposition for how consumers will pronounce its mark is that the diminutive of “Beverly” is pronounced “Bev” with a short “e.” Not only is Applicant’s proposition wrong, but the weak support offered for such an important claim cannot support summary judgment. “Beverly” and “Bev” are words with a widely known and accepted pronunciation. But LIXALEV is not a shortened version of any English word and there is neither a known nor accepted pronunciation.

Applicant’s argument that “there are no known words ending with LEV that are pronounced with the long ‘e’ sound” is sophistry. Applicant cites no words ending with LEV, or

even just EV, that are pronounced with the short “e” sound either and, assuming there were any, they would be few indeed. What this means is that consumers will pronounce the “e” in ALEV much as they pronounce the “e” in other words that contain L-E-V or E-V, and it cannot be disputed that closely related words containing those letters are commonly pronounced either with a long “e” or a short “e” and sometimes pronounced both ways. *See* Declaration of Edward Finegan in Support of Bayer Healthcare LLC’s Opposition to Applicant’s Motion for Summary Judgment (Finegan Declaration) at ¶¶ 7-11. As noted by Professor Finegan, one of the country’s foremost linguistic experts, this makes it likely that some consumers will pronounce LIXALEV with a long “e” and some with a short “e.” *Id.*

Professor Finegan’s analysis is consistent with the holdings of the Board, which has repeatedly held that “[t]here is no such thing as a correct pronunciation of a trade mark. It is pronounced in different ways by different people.” *Am. Prods. Co. v. Leonard*, 11 U.S.P.Q. 184, 184 (C.C.P.A. 1931) (debating the pronunciation of “ZENO” and “ZANOL”) ; *see also Sterling Drug Inc. v. Sankyo Co.*, 139 U.S.P.Q. 395, 396 (T.T.A.B. 1963) (holding that when determining how to pronounce the marks BIOTAMIN and BIOMINES for purposes of a likelihood of confusion analysis, “it should be remembered that there is no such thing as a correct way of pronouncing trademarks.”); *Ex parte J. H. Clarke & Co.*, 95 U.S.P.Q. 226 (Comm’r., 1952) (stating that in analyzing whether the mark DURAFLEX should be pronounced “DUR-A-FLEX” or “Du RAFLEX,” the court should consider that there is no such thing as a correct pronunciation of a trade mark).

Even assuming LIXALEV were pronounced using a short “e” sound, however, courts have held that “slight differences in the sound of similar trademarks will not protect the infringer.” *G. D. Searle & Co. v. Pfizer & Co.*, 265 F.2d 385, 387 (7th Cir. 1959) (DRAMAMINE and BONAMINE held to be confusingly similar in sound even though they begin with different initial sounds and incorporate different letters). Because there are material



factual disputes both as to the pronunciation of LIXALEV and as to the similarity in sound to ALEVE, Applicant's motion fails.

**4. The Similarity of the Marks' Commercial Impressions Is a Disputed Issue of Material Fact.**

Applicant argues that LIXALEV and ALEVE create different commercial impressions, stating that while "[t]he ALEVE mark is intended to evoke the word 'alleviate,' the LIXALEV mark is a 'fanciful mark that does not convey any clear meaning.'" Memorandum at 8-9. Applicant has provided no evidence to prove that the mark ALEVE is intended to evoke the word "alleviate" let alone evidence of what meaning consumers may ascribe to it. But even if consumers do form some association with the word "alleviate," they would likely do so with the mark LIXALEV as well, as both marks contain the same four letters of "alleviate": A-L-E-V.

While Applicant argues that LIXALEV is in no way suggestive of ALEVE because it lacks any clear meaning, the reality is to the contrary. Because the prefix "LIX" carries no meaning in the English language, consumers are likely to identify "ALEV" as the only familiar part of the word. Joachimsthaler Declaration at ¶ 31. "LIX" does not exist as a prefix in the English language. *Id.* at ¶ 30. When consumers see or read the name LIXALEV, they are likely to recognize the common morpheme "ALEV" which is emphasized and is shared with the well-known ALEVE brand. *Id.* This familiarity is likely to outweigh the distinctiveness of the unknown prefix "LIX" which may then go ignored and, as a result, the consumer will principally react to "ALEV." *Id.* While consumers might not know the full extent of the meaning of the word LIXALEV, they will recognize ALEV and assume LIXALEV and ALEVE are related (*e.g.*, that LIXALEV is a brand extension of ALEVE or a prescription version of the product). *Id.* As such, they are even more likely to associate LIXALEV with ALEVE and thereby confuse the two. *Id.* Because the similarity of the marks based upon their commercial impressions remains a disputed fact, Applicant's motion for summary judgment must be denied on this ground as well.

5. **Applicant and Opposer Dispute the Similarity of the Goods and the Relevant Markets and Channels of Trade.**

While Applicant has conceded that the goods sold in conjunction with both marks are pharmaceuticals, it argues that the alleged differences in the goods and the channels of trade are sufficient to preclude confusion. Applicant's argument is erroneous and raises yet another issue of material fact.

Applicant argues that because its product will be pharmaceutical preparations available only by prescription, there is little risk of confusion with Bayer's OTC products. But this assertion is unsupported, and many courts have discredited this notion and found likelihood of confusion in cases involving prescription medications and OTC drugs. *See, e.g., Pennwalt Corp. v. Center Labs., Inc.*, 524 F. Supp. 2d 235 (Fed. Cir. 1975) (finding likelihood of confusion between ALLEREST for OTC allergy tablets and ALLERSET for injection treatment sets prescribed by a doctor); *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.2d 456, 56 U.S.P.Q.2d 1942 (7th Cir. 2000) (HERBROZAC OTC drug is an infringement of PROZAC for a prescription anti-depressant). Courts have recognized that "confusion in medicines must be avoided." *Cole Chem. Co. v. Cole Labs.*, 118 F. Supp. 612, 616-17 (D.C. Mo. 1954).

Furthermore, courts have held that the ultimate consumers of prescription medications are in fact patients, so the fact that Applicant's product is to be prescribed by a doctor is irrelevant to the inquiry regarding customer confusion. *Kos Pharm. Inc. v. Andrx Corp.*, 369 F.3d 700, 716 n.12 (3d Cir. 2004) ("While doctors and pharmacists play a gate-keeping role between patients and prescription drugs, they are not the ultimate consumers. Patients are.") Prescription medications are increasingly marketed directly to potential patients. *See* Goldman Declaration at ¶¶ 6-8, attaching as exhibits exemplars of popularly available direct advertising for various pharmaceuticals. Because of this trend of direct advertising, the ultimate consumer of the drug has become a critical piece of courts' relevant market analysis. *See, e.g., Puritan-Bennett Corp.*

*v. Penox Techs. Inc.*, No. IP 02-0762-C, 2004 WL 866618, at \*4 (S.D. Ind. Mar. 2, 2004) (admitting evidence of patient confusion as to medical devices available only by prescription but advertised directly to patients because patients “are a part of, although not the entire, relevant market”); *Upjohn Co. v. Am. Home Prods. Corp.*, No. 1:95CV237, 1996 WL 33322175, at \*4 (W.D. Mich. Apr. 5, 1996) (holding that patients are among relevant consumers for prescription drugs whose marketing targets them).

Applicant also asserts that there is little risk of confusion because Bayer’s mark is “principally used with pain medication while Biogen’s product is for the treatment of cardiovascular disorders.” Memorandum at 11. This naked argument does not eliminate a dispute of material fact as to the similarity of the goods and the relevant market. As a threshold matter, the mere fact that medicines are designed for different ailments does not bar a finding of likelihood of confusion. *Morgenstern Chem. Co. v. G. D. Searle & Co.*, 253 F.2d 390, 393 (3d. Cir. 1958) (“[T]he test as to whether or not there is confusing similarity in these products even if prescribed and dispensed only by professional trained individuals does not hinge on whether or not the medicines are designed for similar ailments”).

Moreover, the core issue in a likelihood of confusion analysis is not whether there is likely to be confusion between the products themselves, but rather whether there is likely to be confusion as to their *source*. See *Porta-Tool, Inc. v. DND Corp.*, 196 U.S.P.Q. 643, 652 (T.T.A.B. 1977) (stating that in determining whether a likelihood of confusion exists, “it is not necessary . . . that the goods . . . be similar or competitive in character. All that is necessary is that the products are related in some manner and/or that they are used by the same individuals and/or that they are marketed under such conditions that they could . . . give rise to the mistaken notion of common origin.”). It is entirely plausible that a company which currently sells pain and cold medicines could produce other pharmaceutical preparations for different indications. Indeed Bayer itself does sell other preparations for different indications.

Because Applicant and Bayer dispute the similarity of the goods and the relevant markets in which their products move for purposes of the likelihood of confusion analysis, Applicant's motion for summary judgment should be denied.

**6. The Sophistication of the Relevant Purchasers Is a Genuine Issue of Material Fact.**

The sophistication of the relevant purchasers is also an issue of material fact that is currently in dispute and cannot be resolved on summary judgment. Applicant argues that because consumers of the LIXALEV product will be medical professionals, they will exercise a higher degree of care and deliberation, and hence will not confuse Applicant's products with Bayer's products. Memorandum at 11-12. Applicant's conclusion is erroneous for a number of reasons. First, as stated above, the ultimate consumers of Applicant's products are actually the patients. Second, courts have repeatedly recognized that "[p]hysicians are not immune from confusion or mistake." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 716 (3d Cir. 2004) (quoting *Morgenstern Chem. Co. v. G. D. Searle & Co.*, 253 F.2d 390, 393 (3d Cir. 1958)); see also *R. J. Strassenburgh Co. v. Kenwood Laboratories, Inc.*, 106 U.S.P.Q. 379, 380 (Comm'r Pat.1955) ("[I]t is common knowledge that many prescriptions are telephoned to the pharmacist and others are handwritten, and frequently the handwriting is not unmistakably legible. These facts enhance the chances of confusion or mistake by the pharmacist in filling the prescription if the marks appear too much alike when handwritten or sound too much alike when pronounced.") Given the stricter standard that courts have applied for assessing likelihood of confusion in pharmaceutical cases, it is not surprising that courts have held that the "expertise of the physicians and pharmacists *may be outweighed by*" this need for heightened care. *Kos Pharm.*, 369 F.3d at 716 (internal citation omitted). Accordingly, there is a material factual dispute with respect to the sophistication of the relevant purchasers, and Applicant's motion should be denied on this ground as well.

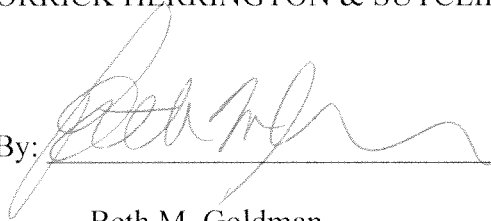
V. CONCLUSION

Applicant has fallen far short of demonstrating a lack of any triable issue of fact. As discussed above, there are numerous disputed material issues of fact. Judgment on the case at this stage would be premature, and judgment for Biogen on the likelihood of confusion issue would be wrong. An analysis of all of the relevant likelihood of confusion factors shows that Applicant's mark will create a likelihood of confusion. For all of the above reasons, Applicant's motion for summary judgment should be denied.

Dated: Nov. 19, 2010

Respectfully submitted,

ORRICK HERRINGTON & SUTCLIFFE LLP

By: 

Beth M. Goldman

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### CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **BAYER HEALTHCARE LLC'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT** is being served upon counsel for Applicant by First Class Mail on this 19<sup>th</sup> day of November 2010, by placing the same in an envelope addressed as follows:

Christina M. Licursi  
Wolf, Greenfield & Sacks, P.C.  
Federal Reserve Plaza, 600 Atlantic Avenue  
Boston, MA 02210-2206

By: \_\_\_\_\_

Beth Goldman

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Bayer HealthCare LLC,  Opposer,  v.  Biogen Idec MA Inc.,  Applicant.	Opposition No.: 91192781  <b>ERICH JOACHIMSTHALER'S DECLARATION IN SUPPORT OF BAYER HEALTHCARE LLC'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT</b>
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I, ERICH JOACHIMSTHALER, declare as follows:

1. I am the Chief Executive Officer of Vivaldi Partners, a strategic marketing and brand strategy consulting firm headquartered in New York with offices in Munich, Hamburg, Zurich and London. I am also a Visiting Professor of Business Administration at IESE (Instituto de Estudios Superiores de la Empresa), one of the leading business schools worldwide offering MBA and global education programs. I have been a branding and marketing professional for more than 20 years, and I have provided expert brand and marketing advice to a diverse set of clients in industries such as healthcare, consumer products, apparel, technology, financial services, entertainment, and energy among others. I am over the age of twenty-one and I am competent to make this declaration. This declaration is based upon personal knowledge, facts gathered upon my request and under my supervision, and statistics and records provided by Bayer Healthcare LLC ("Bayer"). If called as a witness, I could testify to these facts.

2. Over the past fifteen years, I have been involved in analyzing and building strong brands for many clients in America, Europe, and Asia. I have worked for clients in every area related to building strong brands. I have assessed the value of brands and their potential for development in several hundred situations, and I have led research on brand management both as an academic and as a consultant.

3. I have published numerous articles and two books on marketing strategy and building strong brands. My book, *Brand Leadership: The Next Level of the Brand Revolution*, which I co-authored with David Aaker, was published by The Free Press in January 2000. It has been a top seller among books on brands over the years. My latest book, *Hidden in Plain Sight: How to Find and Execute Your Next Growth Strategy*, was published by the Harvard Business Press in May 2007. It won the Berry-AMA Best Book of the Year award from the American Marketing Association in 2008. It has been translated into seven languages. Also, my work has been extensively published in academic journals such as the *Harvard Business Review*, *Journal of Marketing Research*, *Journal of Marketing*, *Journal of Consumer Research*, and *Sloan Management Review*.

4. I have held faculty positions at the Darden Graduate School of Business Administration at the University of Virginia, the University of Southern California, the University of Houston, and IESE (Instituto Estudios Superiores de la Empresa).

5. In 1988, I completed a post-doctoral fellowship at Harvard Business School. I received my Ph.D. in Business Administration, with emphasis on statistics and marketing, from the University of Kansas in 1985. I also received my Master's Degree of Science from the



University of Kansas in 1981, with emphasis in quantitative methods. In 1979, I received my Economics Degree from the Fachhochschule Giessen-Friedberg, Germany.

6. I have served as an expert witness in several cases concerning how brand equity erodes, how brands are damaged, and how consumer confusion is created due to actions of different brands. A more detailed summary of my training, past experience, and prior testimony appears in Exhibit A at the end of this testimony.

7. I am being compensated at my normal and customary hourly rate for performing my services. My consulting firm's research staff is also being compensated at their normal and customary hourly rates for their time spent performing services.

#### **SUMMARY OF ISSUES AND OPINION**

8. I was retained by Bayer and asked by counsel to provide an opinion on several issues:

- a. Does the LIXALEV brand name cause consumer confusion with the already established ALEVE brand?
- b. Does LIXALEV have potentially adverse consequences for the ALEVE brand?

9. I have reviewed and relied on research as I customarily do to study brands for my clients in my consulting practice or in my academic research. Among other materials, I relied on the following:

- a. Documents including:

- i. ALEVE Market Penetration Chart, provided by Bayer and attached hereto as Exhibit B.
    - ii. ALEVE Brand Recognition Chart, provided by Bayer and attached hereto as Exhibit C.
  - b. Materials collected and researched by Vivaldi Partners through:
    - i. Research of existing database that measures the strengths of brands with consumers
    - ii. Research of databases that contain articles and periodicals on branding, advertising, communications and marketing
    - iii. Specific reference sources in the pharmaceutical industry
10. Based on my analysis, outlined in this report, I have arrived at several conclusions. They are explained and amplified in the detailed analysis that follows:
- a. ALEVE is a well-known and famous brand that has strong and unique equities along key brand asset dimensions.
  - b. ALEVE will be exposed to several adverse effects if LIXALEV is made available in the market. These effects can damage the brand equity of ALEVE due to consumer confusion.
  - c. LIXALEV will likely benefit or trade on the established strengths of the ALEVE brand.

#### DETAILED ANALYSIS

11. In the following, I will first apply the conceptual branding model of brand equity to structure my analysis and results, and to formulate my conclusion concerning the brand strength of ALEVE. I will then discuss the specific damage to ALEVE that can result from the similarity between the ALEVE and LIXALEV names.

### **The Strength of the ALEVE Brand Name**

12. The concept of brand equity emerged in the late 1980's and is based on the idea that a brand provides a quantifiable value to a company's success by driving preference, consideration, purchase and loyalty. Brand equity is defined as the set of assets or liabilities that add to or subtract from the value provided by a product or service.<sup>1</sup> It is measured by brand strength and reflects the notion that the brand's value is greater than the sum of its tangible assets (i.e., product, design and distribution capabilities).

13. An assessment of a brand's equity includes all aspects of the brand that influence customer response or brand performance in the market place. From a practical and a managerial perspective, it is important to decompose brand equity into its different components. David A. Aaker and I began to conceptualize the components of brand equity in the early 1990's, as described in our book *Brand Leadership*. The conceptualization that we described in the book consists of a number of "asset dimensions" including awareness, associations, perceived quality, loyalty or affinity, and other proprietary brand assets (e.g., trade relationships).

14. In the following paragraphs, I will analyze the brand equity of ALEVE. This will establish the basis for my declaration as to whether and how ALEVE likely will be affected by LIXALEV.

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<sup>1</sup> David A. Aaker, *Managing Brand Equity*, The Free Press, New York, NY 1991; David A. Aaker and Erich Joachimsthaler, *Brand Leadership: The Next Level of the Brand Revolution*, The Free Press, New York, NY 2000.

## *Awareness*

15. Brand awareness refers to consumer familiarity with a brand and its branding elements (e.g., name, logo). Awareness is generated through meaningful exposures to a brand, which can be achieved, for example, through advertising such as TV, print, and radio or through other forms or channels such as doctor or nurse recommendations. Successful brand builders often utilize a variety of other brand-building programs such as complementary product offerings, giveaways, promotions, websites, point-of-purchase distribution, and tradeshow. Awareness or familiarity creates value because extant empirical research has shown that sheer familiarity creates liking and preference.<sup>2</sup> In addition, awareness is an important asset dimension because it lays the foundation for establishing other assets of brand strength. While awareness is not sufficient on its own, a brand would have little hope of establishing the other asset dimensions of brand strength without it.

16. ALEVE has achieved high awareness amongst the American public. ALEVE's targeted marketing as a low-dose, long-term pain relief option was vitally important in raising initial awareness for the drug and in placing it among the most well-known OTC pain relievers. In 2009, % of consumers recognized the ALEVE brand when shown a photo of common pain relief brands; this makes it, in my opinion, a very famous and well-known brand.<sup>3</sup> ALEVE also ranked in market penetration, with % of households purchasing the drug.<sup>4</sup>

17. It is important to distinguish between two types of brand awareness. One is the depth of awareness and the other is breadth of awareness. Depth of awareness measures how

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<sup>2</sup> Robert B. Zajonc (1980), *Feeling and Thinking: Preferences Need No Inferences*, *American Psychologist*, 35(February), 151-171.

<sup>3</sup> Brand Recognition Chart, received from Counsel, September 23, 2009.

<sup>4</sup> Market Penetration Chart, received from Counsel, September 23, 2009.

likely it is for a brand element to come to mind, and the ease with which it does so.<sup>5</sup> For example, when thinking of pain relief or common OTC brands, it is likely that ALEVE will come to mind quite readily. ALEVE has achieved this brand awareness as a result of Bayer's enormous investments in marketing and advertising. Bayer is well known for having a very high advertising budget, and much is spent on ALEVE. In 2007, for example, Bayer spent about \$1.2 billion on ALEVE.<sup>6</sup> The second dimension, breadth of awareness, measures the range of purchase and usage situations in which the brand element comes to mind, and depends to a large extent on the organization of brand and product knowledge in memory.<sup>7</sup> In my assessment, ALEVE has achieved a high breadth of brand awareness: when a consumer has a back ache, sore muscles, a headache, arthritis pain, or menstrual cramps, ALEVE is often the first name that comes to mind for long-lasting relief. Because ALEVE sits in such a competitive category where most of consumers' pain relieving options offer very similar results, creating depth and breadth of awareness is an important brand asset dimension for ALEVE.

#### *Associations*

18. A second fundamental asset dimension of a brand is associations. Brand associations are anything in memory 'linked' to the brand.<sup>8</sup> An association can be a visual image (Ronald McDonald for McDonald's), a feature (iPod's distinctive design and use of color), an attribute (Volvo's safety), a gesture (Allstate's hand gesture associated with the tagline: You are in good hands with Allstate), or a benefit (Crest's cavity prevention). Such associations form the

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<sup>5</sup> Kevin Lane Keller, *Strategic Brand Management: Building, Measuring, and Managing Brand Equity*, Third Edition, Pearson Prentice Hall, Upper Saddle River, NJ, 2008.

<sup>6</sup> "Bayer – Top 13 Ad Budgets", *FiercePharma*, September 23, 2008. <http://www.fiercepharma.com/special-reports/bayer-top-13-advertising-budgets>.

<sup>7</sup> Elizabeth Cowley and Andrew A. Mitchell (2003), "The Moderating Effect of Product Knowledge on the Learning and Organization of Product Information," *Journal of Consumer Research*, 30 (December), 443-454.

<sup>8</sup> David A. Aaker, *Managing Brand Equity*, New York, NY, The Free Press, 1991.

core of how consumers evaluate a brand on an ongoing basis. A brand has value when consumers' associations are strong, favorable, and unique because they differentiate a brand in consumers or customers' mind from other brands. Differentiation is important because it facilitates learning of new brand information or retrieval of brand information from memory when consumers or customers perceive a need for a remedy or consider a purchase.<sup>9</sup>

19. ALEVE has achieved strong, favorable and unique brand associations among consumers. These positive associations include pain relief, control, freedom, pain-free movement, and fewer daily doses, and can be discerned from a content analysis of numerous writings in the media about ALEVE.<sup>10</sup> Furthermore, phrases such as "control over pain" and "freedom to do the things you want" are also associated with ALEVE.<sup>11</sup> Advertising campaigns also reinforce these associations. For example, a commercial with Star Trek's Mr. Spock smiling while forming his fingers into a V to give the Vulcan hand signal – which he can only do thanks to ALEVE's pain relief<sup>12</sup> – or a print ad showing various bodies contorted into difficult positions to spell out "Never Stop Moving," again communicates the pain-free movement experienced as a result of ALEVE.<sup>13</sup>

#### *Perceived Quality*

20. Perceived quality is "the customer's perception of the overall quality or superiority of a product or service with respect to intended purpose, relative to alternatives."<sup>14</sup> It

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<sup>9</sup> Kevin Lane Keller, *Strategic Brand Management: Building, Measuring, and Managing Brand Equity*, Third Edition, Pearson Prentice Hall, Upper Saddle River, NJ, 2008.

<sup>10</sup> See for example: Brent Green. "The Pain of Being Boomers and Bayer's ALEVE," *Boomers*, May 8, 2009. <http://boomers.typepad.com/boomers/2009/05/the-pain-of-being-boomer-and-ALEVE.html>.

<sup>11</sup> Sara Eckel. "Road to Recovery – Bayer Consumer Care's Marketing Strategy for ALEVE Pain Medication." *American Demographics*, March 1, 2001.

<sup>12</sup> <http://www.beyondspock.de/Bilder/commercials/ALEVE.jpg>.

<sup>13</sup> <http://rmion.com/blogger/?p=93>.

<sup>14</sup> David A. Aaker, *Managing Brand Equity*, The Free Press, New York, NY, 1991.

is an association, but it is often separated out because of its strategic importance as the source of many brands' competitive advantages.

21. Introduced into the general analgesic category when various strong brands were already in existence, such as Advil and Tylenol, Bayer has been able to grow ALEVE by identifying the drug's differentiated functional benefits and by building on perceived quality associations.

22. Bayer has also broadened ALEVE's perceived quality equities by focusing on efficacy. Bayer's research suggested that consumers wanted to take fewer pills throughout the day in order "...to keep their freedom."<sup>15</sup> As a result, Bayer created a positioning exemplified by the now known slogan, "2 pills. All Day Relief," which speaks to the ALEVE's unique dosing. While competitors require up to eight pills to be taken throughout the course of the day, one ALEVE pill can last up to twelve hours. The perceived quality benefits are now very strong. Such an overall perceived quality, namely prescribability, for providing long-lasting, pain-free movement through low-level dosing is an important ALEVE brand asset dimension.

23. Another dimension of perceived quality that ALEVE has developed is value, or good value for money, achieved through "excellent efficacy."<sup>16</sup> The logic for developing this perceived quality dimension stems from increasing healthcare cost scrutiny. Consumers and physicians are increasingly looking at value as a key differentiator in their decision making, and ALEVE is well positioned to play up its value since it requires only a quarter of the pills required by key competitors to provide all day relief.

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<sup>15</sup> *Ibid.*

<sup>16</sup> Stuart Elliott. "An Old Buzzword is Back: Bargains." *The New York Times*, October 24, 2008.

24. In conclusion, Bayer has developed perceived quality assets for ALEVE by differentiating based on broad functional benefits (efficacy and long-lasting relief), while also developing perceived quality across many indications and a broad range of symptoms. These equities have been developed not just among end consumers, but also among physicians or nurses, who have also been an important target market for Bayer. Research shows that doctor recommendation increased ALEVE's market share by % versus a % increase in market share without a recommendation.<sup>17</sup>

#### **Potential Damage to the ALEVE brand**

25. In this section, I will use well-accepted theories and empirically proven principles from existing psychology and marketing literature to explain how the similarity between the ALEVE and the LIXALEV name can confuse consumers and physicians; how consumers make judgments and inferences; and how consumers misinterpret and falsely process brand name information.

26. The greater the similarity between two objects or brand names, the more likely a consumer is to be confused. An important theory of similarity has been put forth by Amos Tversky,<sup>18</sup> which predicts that the perceived similarity between two objects A and B is a positive function of the set of features (e.g., name, traits, associations, characteristics, features, attributes) that the two objects have in common and a negative function of the set of features that they do not share. That is, the features that A possesses and B does not possess and the features that B possesses and A does not possess. For example, two persons will be judged as being physically very similar if they share many common physical attributes (e.g., height, weight, and hair color),

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<sup>17</sup> The Aleve "arthritis pain relief" Success Story, Resonant Communications, 2009, p. 4.

<sup>18</sup> Tversky, Amos (1977), "Features of Similarity," *Psychological Review*, 84 (4), 327-52.



and will be judged as very dissimilar if they share only few attributes (e.g., one person wearing a beard).

27. Applied to brands, Tversky explains how a common brand name can create confusion. This is particularly important in the pharmaceutical industry where consumers use brand names as ‘handles’, that is, brand names are the central nodes in the branded memory network in consumers’ mind. To demonstrate this theory, I will use two foundational scientific perspectives, one is a linguistic perspective and the other is a consumer information processing and cognitive consumer memory perspective.

28. From a linguistic perspective, I will analyze how consumers infer meaning from certain linguistic characteristics of brand names in general and from ALEVE versus LIXALEV in particular. This will explain the nature of the similarity between the two names and how such similarity influences consumer perceptions, evaluations, and preferences. From a consumer memory perspective, I will analyze how consumers process the information contained in the ALEVE and LIXALEV brand names. I will also show how consumer information processing is influenced by the cognitive network of associations that are linked to ALEVE in the memory of consumers and physicians specifically or to the brand equity of ALEVE in general.

29. There are many linguistic features and characteristics of brand names that influence how consumers understand them. These linguistic features and characteristics also influence preference and product evaluation. Two such features are morphology and phonetic symbolism. The former deals with the formation of brand names through combinations of

prefixes, roots, and suffixes, and the latter deals with the relationship between sound and meaning formation.<sup>19</sup>

30. From a morphological perspective, ALEVE shares a common morpheme with LIXALEV: "ALEV". In a way, LIXALEV is a brand name that was created through the affixation of an unknown prefix, "LIX", with the known morpheme "ALEV". It is important to note that "LIX" does not exist as a prefix in English language. While it is used as a suffix in words such as Calix, Helix, and Prolix, as a prefix, it is uncommon. Based on this, Tversky's theory predicts that there is a high likelihood of confusion between the words ALEVE and LIXALEV since the central node in its branded network is its name. This could cause errors in consumers' or physicians' retrieval, encoding and learning processes. For example, it is possible that a physician could learn about LIXALEV and invoke the branded network of ALEVE in his or her mind. This is particularly important because research shows that when people have little time to make a decision, recognition judgments must be made very rapidly, and they tend to cognitively activate simple familiarity processes rather than more complex memory retrieval processes.<sup>20</sup> In other words, in a typical situations, when consumers or physicians see or read the name LIXALEV, they are likely to recognize the common morpheme "ALEV", which is emphasized and is shared with the well-known ALEVE brand. This familiarity outweighs the distinctiveness of the unknown prefix "LIX", which may then go ignored and, as a result, the consumer only reacts to "ALEV". While consumers might not know the full extent of the meaning of the word LIXALEV, they will recognize "ALEV" and assume LIXALEV and

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<sup>19</sup> Tina M. Lowery, L. J. Shrum, and Tony M. Dubitsky. (2003), "The Relation Between BrandName Linguistic Characteristics and Brand-Name Memory." *Journal of Advertising*, Vol. 32, No. 3, 7-17.

<sup>20</sup> Gary Gillund and Richard M. Shiffrin (1984), "A Retrieval Model for Both Recognition and Recall," *Psychological Review*, 91 (1), 1-67.

ALEVE are related, imposing the pre-existing notions of ALEVE onto LIXALEV. In short, a consumer or physician is likely to confuse the two, which could result in her making inferences and judgments that are mistaken.

31. From a morphological perspective, it is very likely that there is not only easier recognition due to familiarity between LIXALEV and ALEVE, but also meaning ascribed to LIXALEV primarily through the common morpheme of “ALEV”. As “LIX”, the unique or “new” part of the word LIXALEV, carries no meaning in the English language, consumers are likely to identify “ALEV” as the only familiar part of the word. Consumers will associate “ALEV” with ALEVE and ascribe meaning to LIXALEV through memory retrieval of attribute information from ALEVE. Hence, it is reasonable to conclude from Tversky’s theory of similarity that there is and will be a high degree of similarity in the names ALEVE and LIXALEV in terms of consumer perceptions. This is likely to confuse consumers.

32. Bayer created meaning for its ALEVE brand name through its establishment of strong brand equity with consumers and physicians, and LIXALEV will be “borrowing” that equity and could benefit from or trade on the value that ALEVE has created.

33. The problems with common pharmaceutical names should not be underestimated and can be disastrous, leading to serious medical errors. For example, the FDA reports that an 8-year-old died after receiving methadone instead of methylphenidate. A 50-year-old woman was hospitalized after taking Flomax, which treats an enlarged prostate, instead of Volmax, which relieves bronchospasm.<sup>21</sup> Other drugs share similar-sounding and similar-looking names with

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<sup>21</sup> *Ibid.*

remarkably different indications: Serzone, an antidepressant, and Seroquel, for schizophrenia; or iodine and Lodine, a non-steroidal anti-inflammatory drug.<sup>22</sup>

34. From a phonological perspective, meaning the sounds of words or phonemes (for example the sound of the letter “e”), it is possible to analyze the effects of hearing ALEVE versus LIXALEV on consumer memory processes. Research from a phonological perspective has shown that brand names with specific phonetic structures spoken aloud produce positive affect, which favorably affects consumers’ brand evaluations.<sup>23</sup>

35. The likely pronunciation of LIXALEV similar to ALEVE is very important since consumers tend to use sound symbolism to interpret the meanings from an unknown name.<sup>24</sup> Consumers will infer the meaning of LIXALEV by mistakenly invoking elements of the memory network of ALEVE or any traces therefore. The processes of how these mistaken inferences take place have been studied to some extent in the consumer behavior literature.<sup>25</sup> These effects occur automatically; that is, the consumer does not control them consciously. The effects of the wrong meaning transfer can be pronounced since phonetic links in memory are highly accessible and hence are easier to retrieve. Empirical research has shown that this affects attitudes toward brands and consumer overall evaluations.

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<sup>22</sup> Carol Rados. “Drug Name Confusion: Preventing Medication Errors.” *FDA Consumer Magazine*. November 10, 2005.

<sup>23</sup> Jennifer J. Argo, Monica Popa and Malcom C. Smith (2010), “The Sound of Brands,” *Journal of Marketing*, Summer, Vol. 74, No. 4.

<sup>24</sup> Richard R. Klink (2000), “Creating Brand Names with Meaning: The Use of Sound Symbolism,” *Marketing Letters*, 11(1), 5-20; Richard R. Klink (2001), “Creating Meaningful New Brand Names: A Study of Semantics and Sound Symbolism,” *Journal of Marketing: Theory and Practice*, 9 (Spring), 27-34.

<sup>25</sup> Eric Yorkston and Geeta Menon (2004), “A Sound Idea: Phonetic Effects of Brand names on Consumer Judgments,” *Journal of Consumer Research*, Vol. 31 (June), 43-51.

36. In summary, the presence of LIXALEV in the market is likely to cause confusion among consumers and may have a negative impact on the brand equity of the well-known ALEVE brand.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19<sup>th</sup> day of November 2010 at NEW YORK, NEW YORK



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Erich Joachimsthaler

## **Exhibit A: Full Resume, Publications, Academic Credentials**

### **ERICH A. JOACHIMSTHALER, Ph.D.**

#### **Residence:**

311 Amsterdam Avenue, # Ph-B  
New York, New York 10023

Tel. 1-917-441-9141  
Cell 1-917-679-8614

Email: [ej@vivaldipartners.com](mailto:ej@vivaldipartners.com)

#### **Office:**

125 Park Avenue, Suite 1500  
New York, New York 10017

Tel. 1-212-965-0900  
Fax 1-212-965-0992

#### **Education**

Post-Doctoral Research Fellow	1987 - 1988	Harvard Business School
Doctor of Philosophy	1981 - 1985	University of Kansas Business Administration Specialization: Marketing and Quantitative Methods
Master of Science	1980 - 1981	University of Kansas Marketing Research
Vordiplom	1979 - 1980	University of Frankfurt Economics
Diplom Betriebswirt	1976 - 1979	Fachhochschule Giessen- Friedberg Business Administration and Computer Science/

#### **Doctoral Dissertation**

"Lp-Norm Estimation in Discriminant Analysis."  
Chairs: John L. Lastovicka and Kenneth O. Cogger

## **Academic Experience**

- 2004 - Visiting Professor of Business Administration  
Department of Marketing, Instituto Estudios Superios de la Empresa (IESE), Barcelona
- 1994 - 1998 Rust Visiting Professor of Business Administration  
Colgate Darden Graduate School of Business Administration  
University of Virginia, Charlottesville
- 1989 - 1994 Associate Professor of Marketing  
Department of Marketing, Instituto Estudios Superios de la Empresa (IESE), Barcelona
- 1985 - 1987 Assistant Professor of Marketing  
Department of Marketing, University of Houston, Houston
- 1982 - 1984 Adjunct Professor of Management  
Institute of Safety and Systems Management, University of Southern California, Los Angeles
- 1981 - 1985 Graduate Instructor in Marketing  
School of Business and School of Journalism, University of Kansas, Lawrence

## **Work Experience**

- 1999 Founder and Chief Executive Officer, Vivaldi Partners, New York, London, Munich, Hamburg, Dusseldorf, Zurich.
- 1998 - 1999 Chairman, Prophet Brand Strategy, New York and San Francisco.
- 1995 - 1998 Aaker-Joachimsthaler & Partners (AJ&P), Charlottesville and Berkeley.  
AJ&P was acquired by Prophet Brand Strategy in January of 1999.
- 1990 - 1994 Alza Limited - Strategic Marketing and Reseach Consultancy, Barcelona.

## **Professional Memberships**

American Marketing Association (AMA)  
The Institute of Management Science (TIMS) - Marketing College  
The Conference Board  
European Academy of Marketing (EAM)  
European Society for opinion and Marketing Research (ESOMAR)

## PERSONAL INFORMATION

Erich is married to Daniela Gomez. Daniela was born in Santa Fe, Argentina and is an audiologist with a specialty for hearing disorders. They have two daughters, Sara, and Sophia and one son, Julian.

## PUBLICATIONS

### A. Publications

#### Brand Strategy and International Marketing

Der Zweck heiligt die Mittel, **Absatzwirtschaft**, 2004.

Ist das Markenarchitektur-Konzept noch zeitgemäße?, **Absatzwirtschaft Online**, 2004.

Müssen die Marken in Zukunft ihre Herkunft verleugnen?, **Absatzwirtschaft**, 2003.

Mitarbeiter: Die vergessene Zielgruppe für Markenerfolge, **Absatzwirtschaft**, 2002.

Je kleiner desto besser, **Absatzwirtschaft**, 2002.

Getting the most out of your branding effort, **Markenartikel**, 2002.

Aufbau von Marken im Zeitalter der Post-Massenmedien, **Moderne Markenführung**, 2001, 3. Auflage, Franz-Rudolf Esch (Eds), Gabler Verlag, Wiesbaden, with David Aaker.

Top Marken Strategien: Markenwert schaffen und absichern, **Absatzwirtschaft**, 2000.

The Branding Relationship Spectrum: The Key to the Brand Architecture Challenge, **California Management Review**, 2000, with David A. Aaker.

Brand Leadership, **Brandweek**, 2000, with David A. Aaker.

Brand Leadership, **The Free Press**, New York, 2000, with David A. Aaker. Translated in German, Spanish, Italian, Finnish, Japanese, Korean, and Portuguese.

The Lure of Global Branding, **Harvard Business Review**, 1999, with David A. Aaker.

Building Brands without Mass Media Advertising: Lessons from Europe, **Harvard Business Review**, 1997, with David A. Aaker.



IMOS: An International Market opportunity Screening System, **Journal of International Marketing**, 1994, with Antonie Stam and V. Kumar.

After the Wall: Marketing Guidelines for Eastern Europe, **Sloan Management Review**, 1991, with John A. Quelch; reprinted in: Después del Muro: Pautas de Comercialización para Europa del Este, **Alta Dirección**, 1992 and European Marketing: Readings and Cases, Chris Halliburton and Reinhard Hünerberg, Addison-Wesley, 1993.

El Valor del País de Origin (The Value of Country of Origin Information), **Actualidad de Economía**, 1991.

#### Methodology

New Answers for Old Questions: Conjoint Analysis Takes the Guess Work out of Marketing Decisions, **Dirección Farmaceutica**, 1994, with Paul Green.

Mathematical Programming Procedures for the Classification Problem in Discriminant Analysis: A Review, **Multivariate Behavioral Research**, 1990, with Antonie Stam.

A Robust Mixed-Integer Approach to Establish Classification Rules for the Discriminant Problem, **European Journal of operational Research**, 1989, with Antonie Stam.

Solving the Classification Problem in Discriminant Analysis Via Linear and Nonlinear Programming Methods, **Decision Sciences**, 1989, with Antonie Stam.

Four Approaches to the Classification Problem in Discriminant Analysis, **Decision Sciences**, 1988, with Antonie Stam.

4MODE1 AND 4MODE2: Fortran IV Programs for the Four-Mode Components Analysis Problem, **Journal of Marketing Research**, (Computer Abstracts), 1985, with John Lastovicka.

RELCON: A Program for the Estimation of Internal Consistency of Composites with Congeneric Measurement Properties, **Journal of Marketing Research**, (Computer Abstracts), 1985, with Lane Curtis.

#### Technology, Strategy and Industrial Marketing Buying/Selling

Decision Support System Implementation: A Meta Analysis, **Management Information Systems (MIS) Quarterly**, 1992, with Maryam Alavi.

Sales Resource Allocation with Multiple Conflicting Objectives: An Interactive Decision Support Aid, **Decision Sciences**, 1991, with Antonie Stam and Lorraine Gardiner.

Order (Market) Selection Given Multiple Conflicting Objectives and Goals: An Interactive Marketing-Manufacturing Decision Model, **Decision Sciences**, 1989, with Antonie Stam and Lorraine Gardiner.

Influence of Formalization on the Organizational Commitment and Work Alienation of Salespeople and Industrial Buyers, **Journal of Marketing Research**, 1988, with Ronald Michaels, William Cron, and Alan Dubinsky.

Multicriteria Issues in Marketing: A Sales Resource Allocation Example and Potential Areas of Future Research, **Lecture Notes in Economics and Mathematical Systems Series**, 1988, Springer Verlag, with Lorraine Gardiner and Antonie Stam.

Individual Difference Factors in the Satisfaction and Usage of a Marketing Decision Support System, **Journal of Marketing Research**, 1987, with George Zinkhan and Thomas C. Kinnear.

Role Stress Among Industrial Buyers: An Integrative Model with Implications for Marketing, **Journal of Marketing**, 1987, with Ronald E. Michaels and Ralph L. Day.

#### Methodology and Consumer Behavior

Measurement Validity of VALS and a Custom Lifestyle Typology with Multiplicative Factoring of Multimethod- Multitrait Matrices, **Journal of Marketing Research**, 1990, with John Lastovicka and John P. Murry.

Improving Personality-Behavior Relationships, **Journal of Consumer Research**, 1988, with John Lastovicka.

A Lifestyle Typology to Model Young Male Drinking and Driving, **Journal of Consumer Research**, 1987, with John Lastovicka, John P. Murry, and Gaurav Bhalla.

Optimal Stimulation Level, Exploratory Behavior Models, **Journal of Consumer Research**, 1984, with John Lastovicka.

#### **B. Books & Book Chapters**

*Hidden in Plain Sight: How to find and execute your company's next big growth strategy*, Harvard Business School Press, 2007.

“Strategie und Architektur fuer Markenportfolios” in Handbuch Markenartikel, 2004, Manfred Bruhn, Gabler Verlag, Wiesbaden, with Markus Pfeiffer.

*Brand Leadership*, The Free Press, New York, 2000, with David A. Aaker. Translated in German, Spanish, Italian, Finnish, Japanese, Korean, and Portugese.

“Branding Challenges For Transitional Economy Firms in Local Markets,” in *Marketing Issues in Transitional Economies*, 1999, Rajeev Batra, Kluwer Academic Publishers, Norwell, Massachusetts, with Jordi Garolera and Dana Pillsbury.

“Nestle Buitoni: The House that Mamma Built,” in *Relationship Marketing: Strategy and Implementation*, 1999, Helen Peck, Adrian Payne, Martin Christopher, and Moira Clark, Butterworth-Heinemann, Oxford, with Edward Hickman.

### **C. Working Papers & Teaching Notes, etc.**

Eastman Kodak: Digital & Applied Imaging, Darden Educational Material, 1996.

Energia General (Eg3): Retail Service Stations in Argentina, Darden Educational Material, 1996.

Nike Europe, IESE Case Publication No. M-968, 1995.

Renault SA, IESE Case Publication No. M-966, 1995.

Hugo Boss AG, IESE Case Publication No. M-965, 1995.

IBM Ambra, IESE Case Publication No. M-963, 1995.

ABB: Electrical Motors, Case Study, 1995.

CCNR-Coca-Cola Nestlé Refreshments, Case Study, 1995.

Corporate Brands, IESE Working Paper.

The Andrex Case Story, IESE Case Publication No. M-952, 1994.

The Nestlé Buitoni Case Story: The House that Mamma Built, IESE Case Publication No. M-953, with Edward Hickman, 1994.

Marketing Metamorphosis: From Products to Brands to Consumers, IESE Working Paper No. MN-282, 1994.

Building Global Brand-Consumer Relationships, IESE Working Paper No. MN-294, 1994.

Maintaining Global Brand-Consumer Relationships, IESE Working Paper No. M-293, 1994.

Conjoint Analysis Takes the Guess Work Out of Pharmaceutical Marketing Decisions, IESE Publication No.: MN-284, with Paul Green, 1994.

The Häagen-Dazs Story, IESE Case Publication No. M-940, with Peter Taugbol, 1994.

The Swatch Story, IESE Case Publication No. M-930, 1993.

Anfi del Mar, S.A., IESE Case Publication No. M-888, with Madhur Mehta 1993; Teaching Note No.: MT-8, and Supplementary Material No.: M-924.

RCI: Service Quality and Its Measurement, IESE Case Publication No. M-905 with Brian Hare, 1993; Teaching Note for RCI M-10.

### **EXPERT WITNESS EXPERIENCE**

*Adidas America, Inc. and Adidas AG v. Payless ShoeSource, Inc.*, expert consultation for Plaintiffs

*Adidas America, Inc. and Adidas AG v. Kmart Corporation et al*, expert consultation for Plaintiffs

*Illinois Tool Works, Inc. (ITW) v. Alcoa Inc. and Reynolds Consumer Products, Inc.*, expert consultation for Defendant

*PepsiCo, Inc. v. The Coca-Cola Company*, 98 Civ. 3282 (LAP), expert consultation for Plaintiffs.

*Empresa Cubana del Tabaco d.b.a. Cubatabaco v. Culbro Corporation and General Cigar Co., Inc.*, 97 Civ. 8399 (RWS), expert consultation for Plaintiffs.

*Peter Norton v. Eileen Norton*, BD 326 561, expert consultation for Defendant, trial.

*Deere & Company v. MTD Holdings Inc., formerly known as MTD Products Inc.*, expert consultation for Plaintiffs, deposition.

*United Parcel Service of America, Inc. v. The Gator Corporation* expert consultation for Defendant, deposition.

*Verizon v. Nextel*, deposition

*Exide v. EnerSys*, deposition

*Remo Imports, Ltd v. Jaguar Canada, Inc. and Jaguar Cars Limited (T-1473-91)* expert consultation for Jaguar

*Brighthouse LLC v. Advance Newhouse Inc, d/b/a, Advance/Newhouse Partnership, and Brighthouse Networks, LLP*, expert consultation for Plaintiffs

*O'Neill Inc. v. Joint Services International BV*, expert consultation for Plaintiffs

*Nissan North America & Nissan Motor Co. v. Audi AG & Volkswagen of America*, expert consultation for Defendant

## EXHIBIT B

### Market Penetration

Aleve was purchased by      % of U.S. households in 2008 and      % of U.S. households in 2009.

■ 2008    □ 2009

REDACTED COPY

# EXHIBIT C

## Brand Recognition

The Aleve name is recognized by % of consumers when shown a photo of common pain relief brands.

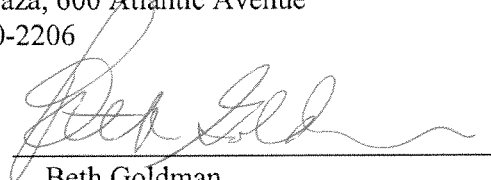
REDACTED COPY

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing **DECLARATION OF ERICH JOACHIMSTHALER IN SUPPORT OF BAYER HEALTHCARE LLC'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT** is being served upon counsel for Applicant by First Class Mail on this 19 day of November 2010, by placing the same in an envelope addressed as follows:

Christina M. Licursi  
Wolf, Greenfield & Sacks, P.C.  
Federal Reserve Plaza, 600 Atlantic Avenue  
Boston, MA 02210-2206

By:

A handwritten signature in cursive script, appearing to read "Beth Goldman", is written over a horizontal line.

Beth Goldman



1000

<p>Bayer HealthCare LLC,</p> <p>Opposer,</p> <p>v.</p> <p>Biogen Idec MA Inc.,</p> <p>Applicant.</p>	<p>Opposition No.: 91192781</p> <p><b>LESLIE PERRELL'S DECLARATION IN SUPPORT OF BAYER HEALTHCARE LLC'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT</b></p>
--	---

I, LESLIE PERRELL, declare as follows:

1. I am a Senior Manager of Market Research in Bayer HealthCare LLC's Consumer Care Division. I have been employed by Bayer Healthcare LLC ("Bayer") since 1993. This declaration is based upon personal knowledge and facts gathered upon my request and under my supervision; if called as a witness, I could testify to these facts.

2. Bayer is one of the world's leading research and development companies dedicated to the discovery and manufacture of innovative products to improve human and animal health and well-being worldwide.

3. Bayer uses the mark ALEVE in connection with pharmaceutical preparations. When the ALEVE over-the-counter (“OTC”) product was publicly launched in 1994, it rapidly generated widespread sales through the United States.

4. Since that launch, Bayer has spent [redacted] in national media advertising for ALEVE, including television ads which have played widely across cable and network channels during all parts of the day and program types (early morning, daytime,

**Opposition No.: 91192781**  
**DECLARATION OF LESLIE PERRELL IN SUPPORT OF BAYER HEALTHCARE LLC'S OPPOSITION**  
**TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT**

**REDACTED COPY**

news, primetime, night, syndicated series, and sports). Bayer's television ads for ALEVE appeared during the Superbowl in 2006.

5. Bayer has spent over [redacted] on advertising for ALEVE in the last three years alone.

6. Products offered under the ALEVE mark have become enormously popular among the consuming public. ALEVE appears on packages in pharmacies, supermarkets and convenience stores throughout the United States. Bayer's revenues from sales of its ALEVE products in 2010 alone are in the

7. Bayer commissions and conducts numerous studies to gather information on market penetration, brand awareness, brand usage, and general attitudes towards its products.

8. I have supervised the preparation of the Market Penetration Chart. The data in this chart comes from

[redacted] The data from this panel shows that [redacted] % of U.S. households purchased Aleve in 2008 and [redacted] % of U.S. households purchased Aleve in 2009. Attached as Exhibit A is a true and correct copy of this chart.

9. I have supervised the preparation of the Brand Recognition Chart. The data presented in the Brand Recognition Chart comes from Bayer's continuous tracking research, designed to monitor consumer awareness and usage of OTC pain relievers.


Data from this research indicates that [redacted] % of consumers

Opposition No.: 91192781  
DECLARATION OF LESLIE PERRELL IN SUPPORT OF BAYER HEALTHCARE LLC'S OPPOSITION  
TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT

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recognized the Aleve name when shown a photograph of common pain relief brands. Attached as Exhibit B is a true and correct copy of this chart.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 19<sup>th</sup> day of November 2010 at Morrisstown, New Jersey

  
Leslie Perrell

Opposition No.: 91192781

DECLARATION OF LESLIE PERRELL IN SUPPORT OF BAYER HEALTHCARE LLC'S OPPOSITION  
TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT

**REDACTED COPY**

# EXHIBIT A

## Market Penetration

Aleve was purchased by  
2009.

% of U.S. households in 2008 and

% of U.S. households in

■ 2008 □ 2009

REDACTED COPY

## **EXHIBIT B**

### Brand Recognition

The Aleve name is recognized by % of consumers when shown a photo of common pain relief brands.

**REDACTED COPY**

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing **DECLARATION OF LESLIE PERRELL IN SUPPORT OF BAYER HEALTHCARE LLC'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT** is being served upon counsel for Applicant by First Class Mail on this 19 day of November 2010, by placing the same in an envelope addressed as follows:

Christina M. Licursi  
Wolf, Greenfield & Sacks, P.C.  
Federal Reserve Plaza, 600 Atlantic Avenue  
Boston, MA 02210-2206

By: \_\_\_\_\_

  
Beth Goldman

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Bayer HealthCare LLC,  Opposer,  v.  Biogen Idec MA Inc.,  Applicant.	Opposition No.: 91192781  <b>EDWARD FINEGAN'S DECLARATION IN SUPPORT OF BAYER HEALTHCARE LLC'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT</b>
---	--

I, EDWARD FINEGAN, declare as follows:

1. I have been retained as an expert by Orrick, Herrington & Sutcliffe LLP in the matter of Bayer HealthCare LLC v. Biogen Idec MA Inc.
2. I have personal knowledge of the facts set forth herein, which are known by me to be true and correct, and if called as a witness I could and would competently testify thereto.
3. This declaration is submitted in support of Bayer HealthCare's Opposition to Biogen Idec's Motion for Summary Judgment.

**Background and Qualifications as an Expert**

4. I hold a Ph.D. from Ohio University and have been a member of the faculty of the University of Southern California since 1968. As of June of 2010 I am professor emeritus of linguistics and law; I teach in USC's law school, where I lecture to first-year students and their legal writing instructors on the application of linguistic principles to legal drafting. I have written extensively on linguistics and the English language, including many book chapters and articles and fifteen books, some of which are used as standard textbooks in North America, Europe, Asia, and elsewhere. I regularly serve as a referee for numerous scholarly journals and book publishers, including Oxford University Press, Cambridge University Press, and the

University of Chicago Press and have served on the editorial boards of several book series and leading journals, including *English Language and Linguistics*, *American Speech*, and *Discourse Processes*. I am a member of the Linguistic Society of America, the American Dialect Society, and the Dictionary Society of North America, among others, and in these organizations have served as a member of executive boards, editorial boards, or standing committees. I am the delegate of the Dictionary Society of North America to the American Council of Learned Societies. A true and correct copy of my curriculum vitae is attached as Exhibit A.

### **My Opinion**

5. English spelling is notorious for its inconsistencies and unpredictability. Among the significant reasons for this situation are (a) a spelling system that was largely stabilized hundreds of years ago while the spoken language, in particular the vowels, continued to change, and (b) a huge number of words borrowed from languages whose spelling practices differ from those of English. George Bernard Shaw's claim that "ghoti" could be pronounced "fish" is exaggerated, but it would be no exaggeration to say that learning to spell English words and inferring pronunciation from their spelling is a challenging enterprise with many hit-and-miss results. That participants in American spelling bees are challenged to spell words whose pronunciation is provided and that such bees have become a minor national sport underscore the vagaries of English spelling and the sometimes slippery relationship between spelling and pronunciation.

6. As is well known, the same letter or letters represent different pronunciations in different English words. For example, all of the following words contain the sounds realized as the name of the letter <c>: *see*, *sea*, *cease*, *seize*, *siege*, *scenic*, *senile*, *cedar*, and *ceiling*, as do the words *juicy*, *glossy*, and *sexy*, whose differently spelled second syllables carry pronunciations that match those of *see* and *sea*.



7. In the case at hand, the question is whether the mark spelled <LIXALEV> would be pronounced with its third syllable as in the first syllable of *leaven* or of *leaving*. It is my opinion that both pronunciations are possible and that some English speakers would pronounce it [līks-ə-lēv] (as in *leaven*) and others as [līks-ə-lēv] (as in *leaving*).

8. Here are my reasons. First, it should be noted that English words ending in the letter <v> are rare. The word-final spelling <ev> is even rarer and word-final <lev> rarer still. For insight, then, as to how English speakers might interpret the spelling <lev>, it is helpful to look elsewhere than at word endings. The English words *lever* and *leverage* contain an <lev> spelling that is routinely and legitimately pronounced two ways—as in *leaving* and as in *leaven*. Other words spelled with <ev> show the same pattern, as with *evangelical*, *evangelicalism*, *evocation*, *evolution*, and *evolutionism*, all represented with both pronunciations in a respected dictionary such as the *American Heritage Dictionary*. The same may be said of the proper given and family name *Evelyn*, which carries both pronunciations. Still other words spelled with <ev> are pronounced only with the vowel of *leaving*, as with *evil* and its related words (*evil eye*, *evil-minded*, *evil doer*) and *evening* and *even* and their related words (*evenfall*, *even-steven*, *even-tempered*, *evenhanded*, *evensong*, *eventide*). The common English noun and verb *levy* is pronounced with the vowel of *leaven*, while the Biblical name *Levi* and the extremely popular denim brand *Levi's* are both pronounced with the vowel of *leaving*. It is also true that some words containing the spelling <lev> are pronounced only as in *leaven*—*levity* and *levitate* are examples—but few English words begin with <lev>, and a good portion of them are proper names. As I said above, even fewer English words end in the spelling <lev>. Among words containing an internal <lev> spelling, the *leaven* pronunciation is exemplified in *eleven* and the *leaving* pronunciation in *alleviate*.

9. Other word pairs, similar to one another in spelling, are pronounced with the <e> of *ever* in one word and the <e> of *even* in the other. Illustrations include *venue* and *venial*; *lentil*

and *lenient*; *senator* and *senior*; *lemon* and *lemur*; *petrify* and *petri (dish)*. Additional pairs are *heave* and *heaven*; *leader* and *leaden*; *lead* (the verb) and *lead* (the noun); *please* and *pleasure*; *legal* and *legacy*; *legion* and *legend*; and the exemplars I have been using—*leaving* and *leaven*.

10. As support for my opinion that the pronunciation of <LIXALEV> is ambiguous, I have thus far exemplified with vowels related to those in contention here, but similar variation in the pronunciation of other vowels is common in English; indeed, such variation may be seen as characteristic. With the vowel spelled <i>, we have the different pronunciations of *libel* and *liberal*, *lilac* and *lily*, and—in a different pattern—of *reprisal* and *reprise* [rī-prēz]. With the vowel spelled <a>, we have different pronunciations in *raven* and *ravenous*, *craven* and *crafty*, *nation* and *national*, and so on. Among sociolinguists there is an annual conference pronounced ěnwāv and spelled <NWAV>. (At one time the word was spelled with a final <e>, standing for *English*, but when the languages of interest were broadened the <e> was dropped, and even neophytes unaware of the earlier spelling routinely pronounce <NWAV> as ěnwāv.) Simply put, there is a good deal of variation in the pronunciation of English vowels that are spelled alike.

11. In conclusion, I have been asked to opine as to whether <LIXALEV> might be perceived by English speakers as representing the pronunciation [līks-ə-lēv]. In my opinion, the answer is yes. For the reasons given above, some English speakers are likely to pronounce <LIXALEV> as [līks-ə-lēv] and others as [līks-ə-lēv].

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17<sup>th</sup> day of November 2010 at Los Angeles, California.

  
Edward Finegan

# **EXHIBIT A**

## **EDWARD FINEGAN**

Department of Linguistics GFS 301  
University of Southern California  
Los Angeles, California 90089-1693  
Tel: 310-210-5264  
Email: Finegan@USC.edu

### **PROFESSIONAL EXPERIENCE**

Professor Emeritus of Linguistics and Law, University of Southern California, 2010—  
Professor of Linguistics and Law, University of Southern California, 1996-2010  
Interim Chair, Department of Linguistics, University of Southern California, 2008-2009  
American Dialect Society Professor of Linguistics, Linguistic Society of America Summer  
Institute, Stanford University, 2007  
Visiting Professor of Linguistics, Linguistic Society of America Summer Institute, University of  
California, Santa Barbara, 2001  
Visiting Professor of English, University of Zurich, Spring/Summer 1998  
Professor of Linguistics, University of Southern California, 1983-96  
Fellow in Law and Linguistics, Harvard University, 1988-89  
Director, American Language Institute/National Iranian Radio and Television (Tehran), 1975-76  
Chairman, Department of Linguistics, University of Southern California, 1969-75  
Associate Professor of Linguistics and English, University of Southern California, 1970-83  
Assistant Professor of English and Linguistics, University of Southern California, 1969-70  
Assistant Professor of English, University of Southern California, 1968-69  
Instructor, English and Linguistics, Case Western Reserve University, 1967-68  
Visiting Assistant Professor of English, Case Western Reserve University, Summer 1967  
Instructor in English, Case Institute of Technology, 1966-67  
Instructor in English, Ohio University, Summer 1964; Spring, Fall, 1965  
Instructor in Mathematics, West Hempstead (New York) Jr.-Sr. High School, 1962-63

### **EDUCATION**

B.S., Iona College, 1962  
M.A., Ohio University, 1964  
University of Michigan, Linguistics Institute, 1965  
Ph.D., Ohio University, 1968

#### Post-doctoral studies:

New York University, Summer 1968  
Ohio State University, Linguistics Institute, 1970  
Harvard Law School, 1988-89

## HONORS

Albert S. Raubenheimer Distinguished Faculty Award, USC College, 2004  
General Education Teaching Award, USC College, 2001  
Diploma of Honor, Phi Kappa Phi, USC Chapter, 1998  
President, Phi Kappa Phi All-University Honor Society, USC Chapter, 1998-99; 2003-2004; 2010-2011  
*Language Learning* Distinguished Scholar-in-Residence, Universidad de las Americas-Puebla, Mexico, October 1995  
Faculty of Arts Visiting Scholar, University of Helsinki, May 1996  
Liberal Arts Fellow, Harvard Law School, 1988-1989  
Albert S. Raubenheimer Distinguished Faculty Award, USC College, 1981  
Associates Award for Excellence in Teaching, USC, 1980  
Visiting Scholar, Linguistics Institute, Ohio State University, 1970  
Phi Kappa Phi, Ohio University, 1964  
NDEA Graduate Fellowship, Ohio University, 1963-1966  
Henry L. Logan Award, Excellence in Science, Iona College, 1962

## PUBLICATIONS

### Books

1. E. Finegan, *Language: Its Structure and Use*, 6th ed. Cengage, in press.
2. P. Frommer and E. Finegan. *Looking at Languages*, 5th ed. Cengage, in press.
3. E. Finegan. *Language: Its Structure and Use*, 5th ed. Thomson/Wadsworth, 2008.
4. P. Frommer and E. Finegan. *Looking at Languages*, 4th ed. Thomson/Wadsworth, 2008.
5. E. Finegan and J. R. Rickford, eds. *Language in the USA: Themes for the Twenty-first Century*. Cambridge University Press, 2004.
6. E. Finegan. *Language: Its Structure and Use*, 4th ed. Thomson/Wadsworth, 2004.
7. P. Frommer and E. Finegan. *Looking at Languages*, 3rd ed. Thomson/Wadsworth, 2004.
8. E. Finegan. *Language: Its Structure and Use*, 3rd ed. Harcourt Brace, 1999.
9. P. Frommer and E. Finegan. *Looking at Languages*, 2nd ed. Harcourt Brace, 1999.
10. D. Biber, S. Johansson, G. Leech, S. Conrad, E. Finegan. *The Longman Grammar of Spoken and Written English*. Longman, 1999.
11. D. Biber and E. Finegan, eds. *Sociolinguistic Perspectives on Register*. Oxford University Press 1994.
12. E. Finegan. *Language: Its Structure and Use*, 2nd ed. Harcourt Brace, 1994.
13. P. Frommer and E. Finegan. *Looking at Languages*. Harcourt Brace, 1994.
14. E. Finegan and N. Besnier. *Language: Its Structure and Use*. Harcourt, 1989.
15. E. Finegan. *Attitudes toward English Usage: The History of a War of Words*. Teachers College Press, Columbia University, 1980.

### Articles, Book chapters

1. E. Finegan, "Response to Louis C. Schaedler, 'Call Me Scientist'." *College Composition and Communication* 18 (1967), 148-50.
2. E. Finegan, "Linguistics and Attitudes toward Usage during the Last Decade." *Pacific Coast Philology* 6 (1971), 20-25.

3. E. Finegan, "Form and Function in Testament Language." R. DiPietro, ed. *Linguistics and the Professions*. Ablex (1982). Pp. 113-20.
4. E. Finegan, "Unconscious Attitudes toward Linguistic Variation." In S. Greenbaum, ed., *The English Language Today*. Pergamon Press (1985). Pp. 92-98.
5. E. Finegan and D. Biber. "Two Dimensions of Linguistic Complexity in English." In J. Connor-Linton et al., eds., *Social and Cognitive Perspectives on Language* (Southern California Occasional Papers in Linguistics 11) (1986), 1-23.
6. E. Finegan and D. Biber. "Toward a Unified Model of Sociolinguistic Prestige." In D. Sankoff, ed., *Diversity and Diachrony*. Benjamins (1986). Pp. 391-98.
7. D. Biber and E. Finegan. "An Initial Typology of English Text Types." In J. Aarts and W. Meijs, eds. *Corpus Linguistics II*. Rodopi (1986). Pp. 19-46.
8. E. Finegan. "English." In B. Comrie, ed. *The World's Major Languages*. Oxford University Press (1987). Pp. 77-109.
9. E. Finegan. "On the Linguistic Forms of Prestige: Snobs and Slobs Using English." In P. Boardman, ed. *The Legacy of Language: A Tribute to Charlton Laird*. U of Nevada Press (1987). Pp. 146-61.
10. D. Biber and E. Finegan. "Adverbial Stance Types in English." *Discourse Processes* 11 (1988), 1-34.
11. D. Biber and E. Finegan. "Drift in Three English Genres from the 18th to the 20th Centuries: A Multidimensional Approach." In M. Kyto et al., eds., *Corpus Linguistics, Hard and Soft*. Rodopi (1988). Pp. 83-101.
12. D. Biber and E. Finegan. "Historical Drift in Three English Genres." In T. Walsh, ed., *Synchronic and Diachronic Approaches to Linguistic Variation and Change*. Georgetown University Press (1989). Pp. 22-36.
13. D. Biber and E. Finegan. "Styles of Stance in English: Lexical and Grammatical Marking of Evidentiality and Affect." *Text* 9 (1989), 93-124.
14. D. Biber and E. Finegan. "Drift and the Evolution of English Style: A History of Three Genres." *Language* 65 (1989), 487-517.
15. E. Finegan. "Variation in Linguists' Analyses of Author Identification." *American Speech* 65 (1990), 334-40.
16. D. Biber and E. Finegan. "On the Exploitation of Computerized Corpora in Variation Studies." In K. Aijmer and B. Altenberg, eds., *English Corpus Linguistics: Studies in Honour of Jan Svartvik*. Longman (1991). Pp. 204-20.
17. E. Finegan. "English." In W. Bright, ed. *Oxford International Encyclopedia of Linguistics*. Oxford University Press (1992).
18. E. Finegan. "Linguistics." In J. Gibaldi, ed. *Research in the Modern Languages and Literatures*. Modern Language Association (1992). Pp. 3-27.
19. E. Finegan. "Style and Standardization in England: 1700-1900." In T. Machan and C. Scott, eds., *English in Its Social Contexts: Essays in Historical Sociolinguistics*. Oxford University Press (1992). Pp. 102-30.
20. D. Biber and E. Finegan. "The Linguistic Evolution of Five Written and Speech-Based English Genres from the 17th to the 20th Centuries." In M. Rissanen et al., eds. *History of Englishes: New Methods and Interpretation in Historical Linguistics*. Mouton (1992). Pp. 688-704.

21. E. Finegan. "Ethical Considerations for Expert Witnesses in Forensic Linguistics." *Issues in Applied Linguistics* 4 (1993), 179-87.
22. D. Biber, E. Finegan, D. Atkinson. "ARCHER and Its Challenges: Compiling and Exploring a Representative Corpus of Historical English Registers." In U. Fries et al., eds. *Creating and Using English Language Corpora*. Rodopi (1994). Pp. 1-13.
23. D. Biber and E. Finegan. "Variation within Medical Research Articles." In N. Oostdijk and P. de Haan, eds., *Corpus-based Research into Language*. Rodopi (1994). Pp. 201-21.
24. D. Biber and E. Finegan. "Introduction: Situating Register in Sociolinguistics." In Biber and Finegan, eds., *Sociolinguistic Perspectives on Register*. Oxford University Press (1994). Pp. 1-12.
25. E. Finegan and D. Biber. "Register and Social Dialect Variation: An Integrated Approach." In D. Biber and E. Finegan, eds., *Sociolinguistic Perspectives on Register*. Oxford University Press (1994). Pp. 315-47.
26. E. Finegan. "Standard English." In A. Purves, ed., *Encyclopedia of English Studies and Language Arts*. Scholastic Inc. (1994).
27. E. Finegan and D. Biber. "That and Zero Complementisers in Late Modern English." In B. Aarts and C. Meyer, eds., *The Verb in Contemporary English*. Cambridge University Press (1995). Pp. 241-57.
28. E. Finegan. "Subjectivity and Subjectivisation in Language: An Introduction." In S. Wright and D. Stein, eds., *Subjectivity and Subjectivisation in Language*. Cambridge University Press (1995). Pp. 1-15.
29. E. Finegan. "What Is 'Correct' Language?: Prescriptivism vs. Descriptivism." *The Field of Linguistics*, Linguistic Society of America. [[www.lsadc.org/info/ling-fields-prescrip.cfm](http://www.lsadc.org/info/ling-fields-prescrip.cfm)]
30. D. Biber and E. Finegan. "Diachronic Relations among Speech-based and Written Registers in English." In T. Nevalainen and L. Kahlas-Tarkka, eds. *To Explain the Present: Studies in the Changing English Language in Honour of Matti Rissanen. Mémoires de la Société Néophilologique de Helsinki*, 52 (1997). Pp. 253-75.
31. E. Finegan and D. Biber. "Relative Markers in English: Fact and Fancy." In U. Fries et al., eds. *From Ælfric to the New York Times: Studies in English Corpus Linguistics*. Amsterdam: Rodopi (1997). Pp. 65-78.
32. E. Finegan. "Sociolinguistics and the Law." In F. Coulmas, ed. *The Handbook of Sociolinguistics*. Blackwell (1997). Pp. 421-35.
33. E. Finegan. "English Grammar and Usage." In S. Romaine, ed. *Cambridge History of the English Language*, Vol. 4. Cambridge University Press (1998). Pp. 536-88.
34. E. Finegan. "Practicing Prescriptivism Now and Then." *American Speech* 75 (2000), 247-49. Repr. *Vocabula Review* 3,2 (2001). <http://www.vocabula.com/VRFeb01Finegan.htm>.
35. E. Finegan and D. Biber. "Register Variation and Social Dialect Variation: The Register Axiom." In P. Eckert and J. Rickford, eds., *Style and Sociolinguistic Variation*. Cambridge University Press (2001). Pp. 235-67.
36. E. Finegan. "Usage." In J. Algeo, ed., *Cambridge History of the English Language*, Vol. 6. Cambridge University Press (2001). Pp. 358-421.
37. E. Finegan. "Linguistic Prescription: Familiar Practices and New Perspectives," *Annual Review of Applied Linguistics* 23 (2003), 213-24.
38. E. Finegan. "English." In W. Frawley, ed. *Oxford International Encyclopedia of Linguistics*, 2<sup>nd</sup> ed. Oxford University Press (2003). Pp. 515-21.

39. E. Finegan, "The Distinctiveness of American English." In E. Finegan and J. R. Rickford, eds., *Language in the USA*. Cambridge University Press (2004). Pp. 18-38.
40. E. Finegan, "The Possibilities and Limits of Corpus Linguistic Description/ Möglichkeiten und Grenzen korpuslinguistischer Beschreibung." In U. Ammon, N. Dittmar, K. Mattheier, and P. Trudgill, eds., *Sociolinguistics/Soziolinguistik: An International Handbook of the Science of Language and Society/Ein Internationales Handbuch Zur Wissenschaft Von Sprache Und Gesellschaft*, 2nd ed. Berlin: Walter De Gruyter (2005). Pp. 1095-1103.
41. E. Finegan, "English in North America." In R. Hogg and D. Denison, eds., *A History of the English Language*. Cambridge University Press (2006). Pp. 384-419.
42. E. Finegan, "Using *DARE* in the Systematic Study of Regional Variation," *DARE Newsletter* 11,4 (2008), 1-4.
43. E. Finegan, "English." In B. Comrie, ed. *The World's Major Languages*, 2nd ed. Routledge (2009). Pp. 55-89.
44. E. Finegan, "Expert linguists and the *whole* truth." *International Journal of Speech, Language and the Law* 16, 2 (2009), 267-77.
45. E. Finegan, "Corpus linguistic approaches to 'legal language': adverbial expression of attitude and emphasis in Supreme Court opinions." In M. Coulthard and A. Johnson, eds. *Routledge Handbook of Forensic Linguistics*. Routledge (2010). Pp. 65-77.

#### **Book reviews**

1. *Constituent Structure* by P. Postal. *Word* 12 (1966), 325-32.
2. *The Roots of Modern English* by L. Myers. *Choice* IV (1967), 1118.
3. *Writing Transformational Grammars* by A. Koutsoudas. *Choice* IV (1968), 1376.
4. *Dimensions of Dialect*, ed. E. Evertts. *Choice* V (1968), 240.
5. *Dictionary of Word and Phrase Origins II* by W. and M. Morris. *Choice* V (1968), 1290.
6. *An Introduction to General Linguistics* by F.P. Dinneen. *Choice* V (1969), 1576.
7. *Attitudes toward English Usage* by W.H. Mittins et al. *Language* 49 (1973), 939-43.
8. *Western Histories of Linguistic Thought* by E.F.K. Koerner. *Language* 58 (1982), 239.
9. *Linguistic Atlas of Middle and South Atlantic States* by R.I. McDavid and R.K. O'Cain. *Language* 58 (1982), 244-45.
10. *The Role of Prescriptivism in American Linguistics, 1820-1970* by G. Drake. *Language in Society* 12 (1983), 284-85.
11. *The Power of Babel* by M. Pierssens. *Language* 59 (1983), 461.
12. *Understanding Written Language* by A.J. Sanford and S.C. Garrod. *Language* 59 (1983), 461-62.
13. *Computer Corpora in English Language Research*, ed. S. Johansson. *Language* 60 (1984), 190-91.
14. *Variation Omnibus*, eds. D. Sankoff and H. Cedergren. *Language* 60 (1984), 198.
15. *Linguistics, Language, and Law: A Topical Bibliography* by J. Levi. *Language* 60 (1984), 199-200.
16. *Language: The Social Mirror* by E. Chaika. *Language* 61 (1985), 729-30.
17. *Introduction to the Sociology of Language* by F. Penalosa. *Language* 61 (1985), 728-29.
18. "Good News on the 'Literacy Crisis'." Rev. of *On Literacy: The Politics of the Word from Homer to the Age of Rock* by R. Pattison. *American Speech* 60:4 (1985), 354-57.
19. *The English Language: A Historical Introduction* by C. Barber. *Linguistics* (1995), 385-88.

20. *Variation in Australian English: The Sociolects of Sydney* by B. Horvath. *Language* 63 (1987), 193-94.
21. *Language and Social Networks*, 2nd ed. by L. Milroy. *Language* 65 (1989), 670-71.
22. *Good English and the Grammarian* by S. Greenbaum. *Language* 65 (1989), 662-63.
23. *Text and Corpus Analysis* by Michael Stubbs. *Computational Linguistics* 23 (1997), 487-89.
24. *Language and Law: A Bibliographic Guide to Social Science Research in the U.S.A.* by J. Levi. *Forensic Linguistics* 4 (1997), 303-304.
25. *Nineteenth-Century English* by Richard W. Bailey. *Language in Society* 29 (2000), 291-94.
26. *Legal Language* by Peter M. Tiersma. *Forensic Linguistics* 7 (2000), 123-27.
27. *Dictionaries: The Art and Craft of Lexicography*, 2nd ed. by S.I. Landau. *Dictionaries* 24 (2003), 260-68.
28. *Practical Lexicography: A Reader*, ed. Thierry Fontenelle. *Dictionaries* 30 (2009), 136-39.
29. *Language Anxiety: Conflict and Change in the History of English* by Tim William Machan. *Journal of English Linguistics*. In preparation.

### **MAJOR RESEARCH FUNDING**

“Diachronic Relations among Speech-Based and Written Registers in English.” National Science Foundation Grant BNS-9019893. 11/90-4/92 (D. Biber and E. Finegan, principal investigators)

### **MEMBERSHIP IN PROFESSIONAL ORGANIZATIONS**

American Dialect Society, Dictionary Society of North America (member of executive board), European Association for Lexicography, International Linguistics Association, International Association of Forensic Linguists, Linguistic Society of America (life member).

### **MEMBERSHIP ON EDITORIAL BOARDS AND CONSULTANCIES**

Consulting Editor, Croom Helm Linguistics Series 1987-1990; General Editor, Oxford Studies in Sociolinguistics, 1988-2002; Member, Editorial Board, *Discourse Processes*, 1983-2002; Member, Editorial Board, *American Speech*, 1985-1988; Member, Editorial Board, *The Writing Instructor*, 1986-1992; Member, Editorial Board, *Journal of English Language and Linguistics*, 1996-2006; Member, Editorial Board, *Corpora*, 2005-present; Member, Editorial Advisory Board, Edinburgh Textbooks in Empirical Linguistics, 1995-present; Member, Editorial Advisory Board, *Advances in Corpus Linguistics*, 2000-present; Dictionary Society of North America Delegate to the American Council of Learned Societies, 2010—.

### **Consultant for Publishers and Journals** (selected)

**Publishers:** Academic Press, Blackwell, Cambridge University Press, Continuum, Edinburgh University Press, Edward Arnold, Harcourt Brace, Macmillan, McGraw-Hill, Modern Language Association, National Council of Teachers of English, Oxford University Press, Palgrave Macmillan, Routledge, St. Martin’s, University of Chicago Press, University of Michigan Press.  
**Journals:** *American Speech*; *Applied Linguistics*; *Argumentation*; *Discourse Processes*; *Forensic Linguistics*; *International Journal of Corpus Linguistics*; *International Journal of Speech, Language and the Law*; *Law and Social Inquiry*; *Law & Society*; *Journal of Linguistic Anthropology*; *Journal of Pragmatics*; *Journal of Sociolinguistics*; *Language*; *Language in Society*; *Linguistics*; *Publications of the American Dialect Society (PADS)*.



### **Miscellaneous** (recent)

Chair, Oversight Committee on Athletic Academic Affairs, USC, 2010—

Member, Humanities Division Personnel Committee, USC College of Letters, Arts, and Sciences, 2009—

Dictionary Society of North America delegate to American Council of Learned Societies, 2010—

Member, Executive Board, Dictionary Society of North America, 2007—

Member, Advisory Board, Levan Institute for Humanities and Ethics, USC

President, Phi Kappa Phi All-University Honor Society, USC (2010-2011)

Invited speaker, “The Language of the Law: Yesterday, Today, and Tomorrow.” Judicial Education Day (Arizona superior court and appellate court judges) (2005)

Co-organizer, “Ethical Issues in Forensic Linguistic Consulting.” Linguistic Society of America, San Francisco (2009)

Invited plenary speaker, “Of course, legal drafters should avoid intensifiers: blah, blah, blah!” International Association of Forensic Linguists, Amsterdam (2009)

### **Selected Doctoral Dissertations Chaired**

A Model of Textual Relations Within the Written and Spoken Modes, Douglas Biber, Regents’ Professor of Applied Linguistics, Northern Arizona University

Linguistic Attitudes in the Basque Country, Estibaliz Amorrortu, Vice Dean for Research and Graduate Studies, Faculty of Arts and Social Sciences, University of Deusto (Spain)

Negotiating Disputes and Achieving Judgments on ‘Judge Judy,’ Fleur van der Houwen, Assistant Professor of Language and Communication, Free University (Netherlands)

Register Variation in Korean, Yong-Jin Kim, Professor of English, Soongsil University (Korea)

The Beginnings of Language Loss: A Discourse Study of American Lithuanian, Jolanta Aritz, Associate Professor Clinical Management Communication, Marshall School, USC

The Effect of Non-native Speaker Status on the Use of Linguistic Accommodation by Native Speakers of Japanese, Christopher Long, Associate Professor, Department of English Language and Literature, Tohoku-Gakuin University (Japan)

The Fono: A Samoan Speech Event, Alessandro Duranti, Professor of Anthropology and Dean of Social Sciences, UCLA

### CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **DECLARATION OF EDWARD FINEGAN IN SUPPORT OF BAYER HEALTHCARE LLC'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT** is being served upon counsel for Applicant by First Class Mail on this 19 day of November 2010, by placing the same in an envelope addressed as follows:

Christina M. Licursi  
Wolf, Greenfield & Sacks, P.C.  
Federal Reserve Plaza, 600 Atlantic Avenue  
Boston, MA 02210-2206

By: \_\_\_\_\_

  
Beth Goldman

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Bayer HealthCare LLC,  Opposer,  v.  Biogen Idec MA Inc.,  Applicant.	Opposition No.: 91192781  <b>BETH GOLDMAN'S DECLARATION IN SUPPORT OF BAYER HEALTHCARE LLC'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT</b>
---	--

I, BETH GOLDMAN, declare as follows:

1. I am an attorney licensed to practice law in the State of California and am a partner at Orrick, Herrington & Sutcliffe LLP, counsel for Opposer Bayer Healthcare LLC ("Bayer") in this action. Unless stated on information and belief, I make this declaration based on my own personal knowledge, and if called as a witness, I could and would competently testify to the matters set forth herein.

2. Attached as Exhibit A are true and correct copies of print-outs from the USPTO's Trademark Applications and Registrations Retrieval ("TARR") system of Bayer's registrations for ALEVE for anti-inflammatory, analgesic and antipyretic pharmaceutical preparations (U.S. Registration No. 1,536,042), ALEVE for pharmaceutical antitussive-cold preparations; preparations for treating colds (U.S. Registration No. 3,287,780), and ALEVE-D for antitussive-cold preparations; preparations for treating colds (U.S. Registration No. 3,719,030).

3. Bayer or its predecessors have filed 42 opposition proceedings in connection with ALEVE in front of the Board to prevent any similar marks for pharmaceutical products from

registering. Bayer's efforts to protect its huge investment in ALEVE have kept similar marks from being registered for pharmaceutical products.

4. Bayer propounded three sets of discovery requests to Applicant Biogen Idec MA Inc. ("Applicant" or "Biogen") on September 21, 2010, which were scheduled to be due on October 26, 2010 prior to Biogen's filing of its motion for summary judgment.

5. On November 3, 2010, I received an email from Applicant's counsel, Christina M. Licursi of Wolf Greenfield, stating that Applicant would not be responding to Bayer's discovery requests until disposition of its summary judgment motion.

6. Attached as Exhibit B are true and correct copies of advertisements directed to consumers for prescription pharmaceutical products, namely, Radiesse® Wrinkle Filler, Latisse®, Abilify®, Crestor®, Juvederm® XC, Botox® Cosmetic, Lipitor®, Premarin®, Reclast®, EstroGel®, Zetia®, and Cimzia®, from the July/August 2010 and October 2010 issues of *More.com* magazine.

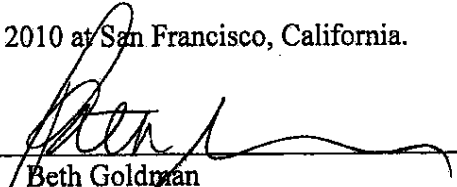
7. Attached as Exhibit C are true and correct copies of advertisements directed to consumers for prescription pharmaceutical products, namely, Viagra® and Cialis®, from the September 2010 issue of *Golf Digest*.

8. Attached as Exhibit D is a true and correct copy of an advertisement directed to consumers for a prescription pharmaceutical product, Lipitor®, from the October 2010 issue of *Scientific American*.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19 day of November 2010 at San Francisco, California.

Dated: November 19 2010

  
Beth Goldman

## EXHIBIT A

**Thank you for your request. Here are the latest results from the TARR web server.**

**This page was generated by the TARR system on 2010-11-17 18:06:43 ET**

**Serial Number: 73726530 Assignment Information Trademark Document Retrieval**

**Registration Number: 1536042**

**Mark (words only): ALEVE**

**Standard Character claim: No**

**Current Status: This registration has been renewed.**

**Date of Status: 2009-07-21**

**Filing Date: 1988-05-05**

**Transformed into a National Application: No**

**Registration Date: 1989-04-25**

**Register: Principal**

**Law Office Assigned: (NOT AVAILABLE)**

**If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov**

**Current Location: 830 -Post Registration**

**Date In Location: 2009-07-21**

---

**LAST APPLICANT(S)/OWNER(S) OF RECORD**

---

**1. BAYER HEALTHCARE LLC**

**Address:**

**BAYER HEALTHCARE LLC**

**100 BAYER ROAD**

**PITTSBURGH, PA 15205**

**United States**

**Legal Entity Type: Limited Liability Company**

**State or Country Where Organized: Delaware**

---

**GOODS AND/OR SERVICES**

---

**International Class:** 005

**Class Status:** Active

ANTI-INFLAMMATORY, ANALGESIC, AND ANTIPYRETIC PHARMACEUTICAL PREPARATIONS

**Basis:** 1(a)

**First Use Date:** 1988-04-25

**First Use in Commerce Date:** 1988-04-25

---

**ADDITIONAL INFORMATION**

---

(NOT AVAILABLE)

---

**MADRID PROTOCOL INFORMATION**

---

(NOT AVAILABLE)

---

**PROSECUTION HISTORY**

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**NOTE:** To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.

2009-07-21 - First renewal 10 year

2009-07-21 - Section 8 (10-year) accepted/ Section 9 granted

2009-04-22 - Assigned To Paralegal

2009-04-20 - TEAS Section 8 & 9 Received

2008-08-19 - Case File In TICRS

2007-01-10 - Automatic Update Of Assignment Of Ownership

2003-09-04 - Counter claim opp. for Proceeding No.

2002-04-22 - TEAS Change Of Correspondence Received

2001-07-14 - Section 15 acknowledged

2001-01-16 - Section 15 affidavit received

2000-10-06 - Post Registration action correction

1998-03-05 - Section 8 (6-year) accepted & Section 15 acknowledged

1995-12-11 - Post Registration action mailed - Section 8

1995-03-28 - Section 8 (6-year) filed



1989-04-25 - Registered - Principal Register  
1989-01-31 - Published for opposition  
1989-01-03 - Notice of publication  
1988-12-31 - Notice of publication  
1988-10-21 - Approved for Pub - Principal Register (Initial exam)  
1988-09-06 - Communication received from applicant  
1988-07-27 - Non-final action mailed  
1988-07-08 - Assigned To Examiner  
1988-07-08 - Assigned To Examiner

---

**ATTORNEY/CORRESPONDENT INFORMATION**

---

**Attorney of Record**  
Jeffrey M. Gitchel

**Correspondent**  
Jeffrey M. Gitchel  
Bayer Corporation  
100 Bayer Road  
Pittsburgh PA 15205  
Phone Number: 412-777-4860  
Fax Number: 412-778-4432

---

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2010-11-17 18:07:10 ET

Serial Number: 77105868 Assignment Information Trademark Document Retrieval

Registration Number: 3287780

Mark

ALEVE

(words only): ALEVE

Standard Character claim: Yes

Current Status: Registered.

Date of Status: 2007-09-04

Filing Date: 2007-02-13

Filed as TEAS Plus Application: Yes

Currently TEAS Plus Application: Yes

Transformed into a National Application: No

Registration Date: 2007-09-04

Register: Principal

Law Office Assigned: LAW OFFICE 107

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 650 -Publication And Issue Section

Date In Location: 2007-09-04

---

LAST APPLICANT(S)/OWNER(S) OF RECORD

---

**1. Bayer HealthCare LLC****Address:**

Bayer HealthCare LLC

100 Bayer Road

Pittsburgh, PA 15205

United States

**Legal Entity Type:** Limited Liability Company**State or Country Where Organized:** Delaware

---

**GOODS AND/OR SERVICES****International Class:** 005**Class Status:** Active

Pharmaceutical antitussive-cold preparations; Preparations for treating colds

**Basis:** 1(a)**First Use Date:** 2000-07-31**First Use in Commerce Date:** 2000-07-31

---

**ADDITIONAL INFORMATION****Prior Registration Number(s):**

1536042

---

**MADRID PROTOCOL INFORMATION**

(NOT AVAILABLE)

---

**PROSECUTION HISTORY**

**NOTE:** To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.

2007-09-04 - Registered - Principal Register

2007-06-19 - Published for opposition

2007-05-30 - Notice of publication

2007-05-14 - TEAS Response to Office Action Received

2007-04-18 - Law Office Publication Review Completed

2007-04-18 - Assigned To LIE

2007-03-27 - Approved for Pub - Principal Register (Initial exam)

2007-03-27 - Assigned To Examiner

2007-02-16 - New Application Entered In Tram

---

**ATTORNEY/CORRESPONDENT INFORMATION**

---

**Attorney of Record**

Jeffrey M. Gitchel

**Correspondent**

JEFFREY M. GITCHEL

BAYER CORPORATE & BUSINESS SERVICES LLC

100 BAYER RD

PITTSBURGH, PA 15205-9707

Phone Number: 4127774860

Fax Number: 4127784432

---

**Thank you for your request. Here are the latest results from the TARR web server.**

**This page was generated by the TARR system on 2010-11-17 18:07:21 ET**

**Serial Number:** 77190305 Assignment Information Trademark Document Retrieval

**Registration Number:** 3719030

**Mark**

**ALEVE-D**

**(words only):** ALEVE-D

**Standard Character claim:** Yes

**Current Status:** Registered.

**Date of Status:** 2009-12-01

**Filing Date:** 2007-05-25

**Transformed into a National Application:** No

**Registration Date:** 2009-12-01

**Register:** Principal

**Law Office Assigned:** LAW OFFICE 106

**If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov**

**Current Location:** 650 -Publication And Issue Section

**Date In Location:** 2009-10-29

---

**LAST APPLICANT(S)/OWNER(S) OF RECORD**

---

1. Bayer HealthCare LLC

**Address:**

Bayer HealthCare LLC  
100 Bayer Road  
Pittsburgh, PA 15205  
United States  
**Legal Entity Type:** Limited Liability Company  
**State or Country Where Organized:** Delaware

---

**GOODS AND/OR SERVICES**

---

**International Class:** 005  
**Class Status:** Active  
Antitussive-cold preparations; preparations for treating colds  
**Basis:** 1(a)  
**First Use Date:** 2007-07-20  
**First Use in Commerce Date:** 2007-07-20

---

**ADDITIONAL INFORMATION**

---

**Prior Registration Number(s):**  
1536042  
2177899  
3287780

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**MADRID PROTOCOL INFORMATION**

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(NOT AVAILABLE)

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**PROSECUTION HISTORY**

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**NOTE:** To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.

2009-12-01 - Registered - Principal Register  
2009-10-29 - Law Office Registration Review Completed  
2009-10-26 - Assigned To LIE  
2009-10-17 - Allowed for Registration - Principal Register (SOU accepted)  
2009-09-24 - Statement Of Use Processing Complete  
2009-05-11 - Use Amendment Filed  
2009-05-14 - Extension 3 granted  
2009-05-11 - Extension 3 filed

2009-05-11 - TEAS Extension Received  
2009-05-11 - TEAS Statement of Use Received  
2009-02-11 - Extension 2 granted  
2009-01-29 - Extension 2 filed  
2009-02-11 - Case Assigned To Intent To Use Paralegal  
2009-01-29 - TEAS Extension Received  
2008-07-24 - Extension 1 granted  
2008-07-24 - Extension 1 filed  
2008-07-24 - TEAS Extension Received  
2008-01-29 - NOA Mailed - SOU Required From Applicant  
2007-11-06 - Published for opposition  
2007-10-17 - Notice of publication  
2007-10-03 - Law Office Publication Review Completed  
2007-10-03 - Assigned To LIE  
2007-09-07 - Approved For Pub - Principal Register  
2007-09-07 - Examiner's Amendment Entered  
2007-09-07 - Notification Of Examiners Amendment E-Mailed  
2007-09-07 - Examiners amendment e-mailed  
2007-09-07 - Examiners Amendment - Written  
2007-09-06 - Assigned To Examiner  
2007-06-01 - New Application Entered In Tram

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**ATTORNEY/CORRESPONDENT INFORMATION**

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**Attorney of Record**  
Jeffrey M. Gitchel

**Correspondent**  
JEFFREY M. GITCHEL

100 BAYER RD  
PITTSBURGH, PA 15205-9707  
Phone Number: 412-777-4860  
Fax Number: 412-778-4432

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## EXHIBIT B

# RADIESSE<sup>®</sup>

WRINKLE FILLER

Welcome back  
your own natural  
collagen & smooth  
out the signs of  
aging...

RADIESSE<sup>®</sup> wrinkle filler provides immediate volume to smooth out the signs of aging. And, it continues to work with your body by stimulating your own natural collagen production. The result is a natural, youthful look that may last a year or more in many patients.

Visit **www.radiesseMORE.com**  
to find a provider near you and take  
advantage of their RADIESSE special!



**Actual RADIESSE<sup>®</sup> Patient**  
**Actual Age: 56**



Treated with one RADIESSE<sup>®</sup> Microdroplet Filler (1.5 cc) syringe

Treated with two RADIESSE<sup>®</sup> Volumetric Advantage (1.5 cc) syringe



\*Actual before and after photos of the patient featured above

## Natural • Immediate • Long-lasting

### Important RADIESSE<sup>®</sup> Wrinkle Filler Treatment Considerations

RADIESSE wrinkle filler is FDA-approved for subdermal implantation for the correction of moderate to severe facial wrinkles and folds, such as nasolabial folds. After injection, patients may experience redness, bruising, swelling or other local side effects. Most side effects of treatment resolve within a few days. More rare side effects may include swelling that lasts longer, unevenness or firmness in the area injected, and as with any injection, there may be a risk of infection.

Individual results may vary. Copyright © 2010 BioForm Medical, Inc. All rights reserved. RADIESSE is a registered trademark of BioForm Medical, Inc. MF 20584-01

**GROW Longer, GROW Fuller,  
and Darker Lashes**

**SEEING IS BELIEVING!**

LATISSE<sup>®</sup> – the first and only FDA approved prescription treatment for inadequate or not enough lashes.

It's easy to ask your doctor if LATISSE<sup>®</sup> is right for you.

**GROW YOUR OWN LASHES**

WEEK 0...NOW



WEEK 16...WOW



Brooke Shields' real lashes unretouched without mascara.

Your results may vary. By prescription only.

GO TO [LATISSEOFFER.COM](http://LATISSEOFFER.COM)  
TO LEARN ABOUT A \$20 REBATE\*

# Latisse

(bimatoprost ophthalmic solution) 0.03%

LATISSE<sup>®</sup> is a prescription treatment for hypotrichosis used to grow eyelashes, making them longer, thicker, and darker. Eyelash hypotrichosis is another name for having inadequate or not enough eyelashes.

#### Important Safety Information:

If you are using, or have used, prescription products for any eye pressure problems, only use LATISSE<sup>®</sup> under close doctor care. Although not seen in LATISSE<sup>®</sup> clinical studies, may cause increased brown pigmentation of the colored part of the eye which is likely permanent. Eyelid skin darkening may occur which may be reversible. Only apply at the base of the upper eyelashes. DO NOT APPLY to the lower eyelid. Hair growth may occur in other skin areas that LATISSE<sup>®</sup> solution frequently touches. If you develop or experience any eye problems or have eye surgery, consult your doctor immediately about continued use of LATISSE<sup>®</sup>. The most common side effects are itchy eyes and eye redness. If discontinued, lashes will gradually return to their previous appearance.

You are encouraged to report negative side effects of prescription drugs to the FDA. Visit [www.fda.gov/medwatch](http://www.fda.gov/medwatch) or call 1-800-FDA-1088.

Please see important product information on the following page. Call 1-866-344-5480 for more information.

LATISSE<sup>®</sup> is a registered trademark of Allergan. All other trademarks are the property of their respective owners.

 **ALLERGAN**  
Allergan Pharmaceuticals International, Inc.  
2200 Central Expressway, Suite 200, Irvine, CA 92614

From Allergan,  
a company with 60 years  
of eye care expertise.

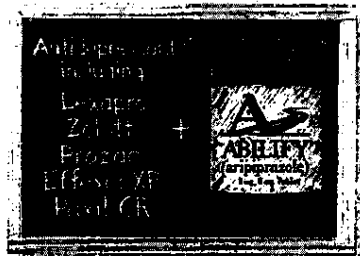
To see more before and after  
results or FIND A DOCTOR  
go to [LATISSE.COM](http://LATISSE.COM)

**"I was reluctant to talk to my doctor  
about my unresolved depression symptoms.  
I'm glad I finally did."**

## Many people being treated for depression still have depression symptoms.

If you've been taking an antidepressant for at least 6 weeks and still have some depression symptoms, one option your doctor may consider is adding ABILIFY.

**ABILIFY is a prescription medicine used to treat depression in adults as add-on treatment to an antidepressant when an antidepressant alone is not enough.**



**Some people have had symptom improvement as early as 1 to 2 weeks after adding ABILIFY.\***

### Important Risk Information about ABILIFY

- Antidepressants can increase suicidal thoughts and behaviors in children, teens, and young adults. Serious mental illnesses are themselves associated with an increase in the risk of suicide. When taking ABILIFY, call your doctor right away if you have new or worsening depression symptoms, unusual changes in behavior, or thoughts of suicide. Patients and their caregivers should be especially observant within the first few months of treatment or after a change in dose. Approved only for adults 18 and over with depression
- Elderly dementia patients taking ABILIFY have an increased risk of death or stroke. ABILIFY is not approved for these patients

\* Lexapro® (escitalopram oxalate), Zoloft® (sertraline HCl), Prozac® (fluoxetine hydrochloride), Effexor XR® (venlafaxine HCl), and Pamelor CR® (paroxetine HCl) are trademarks of their respective companies.

† Based on 6-week clinical studies comparing ABILIFY + antidepressant versus antidepressant alone.

- Call your doctor if you have high fever, stiff muscles, confusion, and increased heart rate or blood pressure—these may be signs of a rare but life-threatening condition called **neuroleptic malignant syndrome**
- Call your doctor if you develop abnormal or uncontrollable facial movements, as these could be signs of **tardive dyskinesia**, which may become permanent
- If you have **diabetes**, or have risk factors or symptoms of diabetes, your blood sugar should be monitored regularly. High blood sugar has been reported with ABILIFY and medicines like it. In some cases, extreme high blood sugar can lead to coma or death
- **Other risks** may include dizziness upon standing, decreases in white blood cells, which can be serious, seizures, impairment in judgment or motor skills, and trouble swallowing. Until you know how ABILIFY affects you, you should not drive or operate machinery

The **common side effects** in adults in clinical trials (≥10%) include nausea, vomiting, constipation, headache, dizziness, an inner sense of restlessness or need to move (akathisia), anxiety, and insomnia. Tell your doctor about all the medicines you're taking, since there are some risks for drug interactions. You should avoid alcohol while taking ABILIFY.

You are encouraged to report negative side effects of prescription drugs to the FDA. Visit [www.fda.gov/medwatch](http://www.fda.gov/medwatch), or call 1-800-FDA-1088.

**Please read the additional Important Information about ABILIFY on the adjacent page.**

**Take the next step—ask your doctor about ABILIFY.**



[www.ABILIFYtreatment.com](http://www.ABILIFYtreatment.com)

If you or someone you know needs help paying for medicine, call 1-800-477-6029 (1-800-477-6029). Or go to [www.payers.org](http://www.payers.org)



Partnership for  
Prescription Assistance

Bristol-Myers Squibb



Otsuka Otsuka America Pharmaceutical, Inc.

570US10AB06401

April 2010

0310A-0262

Printed in USA

30 YEARS AGO, YOU DIDN'T  
KNOW ABOUT HIGH CHOLESTEROL  
AND PLAQUE BUILDUP.

FORTUNATELY, NOW YOU DO.

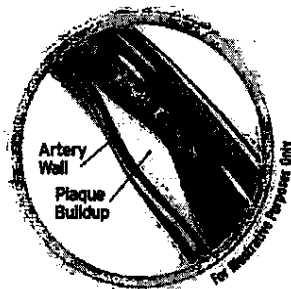
Over time, you've learned a thing or two.  
Now, you know that high cholesterol is a major  
factor in the buildup of plaque in your arteries.  
Here's how CRESTOR can help.

- Along with diet, CRESTOR does  
more than ▼ lower bad cholesterol.  
It also raises the good
- CRESTOR is also proven to slow  
the buildup of plaque in arteries as  
part of a treatment plan to lower  
cholesterol to goal

High cholesterol, family history  
of early heart disease, diabetes,  
and high blood pressure may play  
a role in plaque buildup

Is prescription CRESTOR right for you?  
Talk to your doctor.

Please read the important Product Information  
about CRESTOR on the following page.



TAKE A DEEPER LOOK  
at how plaque could be  
building in your arteries.  
Take an interactive  
tour of an artery at  
[CRESTOR.COM](http://CRESTOR.COM)



800-CRESTOR

[CRESTOR.COM](http://CRESTOR.COM)



**CRESTOR**<sup>®</sup>  
rosuvastatin calcium

AstraZeneca 



Kiss those  
lines  
goodbye!™

Discover new  
**Juvederm XC**

**Parentheses have a place (but not on your face).**

New JUVEDERM® XC is the smooth gel filler your doctor uses to smooth out those parentheses lines along the sides of your nose and mouth -- instantly. One treatment means smooth and natural-looking results for up to one year. What are you waiting for?

Go to [Juvederm.com](http://Juvederm.com) to find out more about JUVEDERM®, the #1 selling dermal filler in the U.S.\*

Individual results may vary. 1.877.FILLER.MD (877-345-5376). JUVEDERM® is indicated for correction of moderate to severe facial wrinkles and folds (such as nasolabial folds). Side effects, usually mild to moderate, include temporary injection site reactions such as redness, pain, firmness, swelling, or bumps. **Please see important treatment considerations on reverse side. By prescription only.**

 **ALLERGAN**  
The Science of Medicine

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\*January through November 2009. US Facial Injectables Market Share Report. SourcePoint Global. For more, visit [www.allergan.com](http://www.allergan.com)

## IMPORTANT SAFETY INFORMATION

**BOTOX® Cosmetic may cause serious side effects that can be life threatening. Call your doctor or get medical help right away if you have any of these problems any time (hours to weeks) after injection of BOTOX® Cosmetic:**

• **Problems with swallowing or breathing**, due to weakness of throat muscles, can be severe and result in loss of life. Get medical help if these problems start existing before or after swallowing problems or difficulty breathing.

• **Spread of toxin effects.** The effect of botulinum toxin may spread away from the injection site and cause serious symptoms including: loss of strength and all-over muscle weakness, double vision, blurred vision, drooping eyelids, hoarseness or change or loss of voice (dysphonia), trouble saying words clearly (dysarthria), loss of bladder control, trouble breathing, trouble swallowing.

There has not been a confirmed serious case of spread of toxin effect when BOTOX® Cosmetic has been used at the recommended dose to treat frown lines.

The dose of BOTOX® Cosmetic is not the same as, or comparable to, another botulinum toxin product.

Serious and/or immediate allergic reactions have been reported. These reactions include: itchy rash, swelling and shortness of breath. Tell your doctor or get medical help right away if you experience any such symptoms after the injection of BOTOX® Cosmetic should be discontinued.

Do not use BOTOX® Cosmetic if you are allergic to any of the ingredients in BOTOX® Cosmetic (see Medication Guide for details) or had an allergic reaction to any other botulinum toxin product such as Myobloc® or Dysport® have to avoid contact with the planned injection site.

Tell your doctor about all your muscle or nerve conditions such as amyotrophic lateral sclerosis (ALS) or Lou Gehrig's disease, myasthenia gravis or Lambert-Eaton syndrome as you may be at increased risk of serious side effects including severe dysphagia (difficulty swallowing) and respiratory compromise (difficulty breathing) from typical doses of BOTOX® Cosmetic.

Tell your doctor about all your medical conditions, including if you have plans to have surgery; had surgery on your face; weakness of forehead muscles, such as trouble raising your eyebrows; drooping eyelids; any other abnormal facial change; are pregnant or plan to become pregnant (It is not known if BOTOX® Cosmetic can harm your unborn baby); are breast-feeding or plan to breast-feed (It is not known if BOTOX® Cosmetic passes into breast milk).

Tell your doctor about all the medicines you take, including prescription and nonprescription medicines, vitamins, and herbal products.

BOTOX® Cosmetic may cause loss of strength or general muscle weakness or vision problems. If this happens, do not drive a car, operate machinery, or do other dangerous activities.

Other side effects of BOTOX® Cosmetic include: dry mouth, dryness or pain at the injection site, weakness, headache, neck pain, and eye problems: double vision, blurred vision, decreased eyelid drooping, eyelids, swelling of your eyelids and dry eyes. For more information refer to the Medication Guide or talk with your doctor.

You are encouraged to report negative side effects of prescription drugs to the FDA. Visit [www.fda.gov/medwatch](http://www.fda.gov/medwatch) or call 1-800-FDA-1088.

Please refer to full Medication Guide on the following page.

## "Once You Get It, You Really Get It."

Why millions of women have experienced **BOTOX® Cosmetic.**

Proven year after year...with real, noticeable results. **BOTOX® Cosmetic** is a prescription medicine that is injected into muscles to temporarily treat moderate to severe frown lines between the brows of adults ages 18 to 65. Ask your doctor if **BOTOX® Cosmetic** is right for you. There's only one **BOTOX® Cosmetic.**

Results may vary. 8 out of 10 women achieved clinically significant results at day 30 in clinical trials.

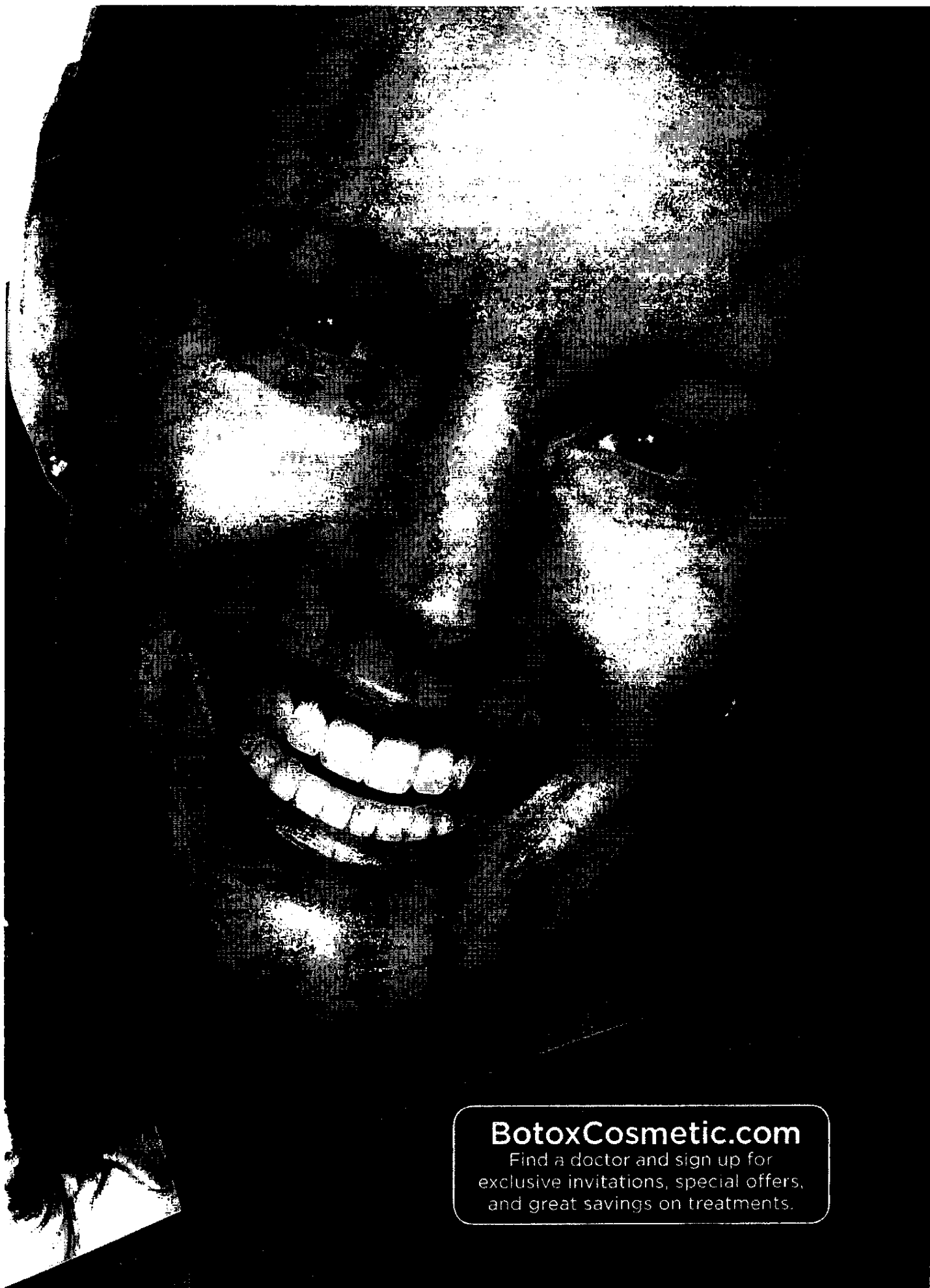
**BOTOX®**  
—Cosmetic  
onabotulinumtoxinA

There's only one **BOTOX® Cosmetic**

By prescription only. 1-800-BOTOX-MD

**ALLERGAN**

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**BotoxCosmetic.com**

Find a doctor and sign up for  
exclusive invitations, special offers,  
and great savings on treatments.



**"Talk about a  
wake-up call.  
I had a heart attack  
at 57."**

~John E.  
Lafayette, CA  
Heart attack: 8/16/2007



**"I should have been doing more for my high cholesterol.  
I learned the hard way. Now I trust my heart to Lipitor."  
Talk to your doctor about your risk and about Lipitor.**

- When diet and exercise are not enough, adding Lipitor may help. Lipitor is FDA-approved to reduce the risk of heart attack and stroke in patients who have heart disease or risk factors for heart disease, including family history of early heart disease, high blood pressure, low good cholesterol, age and smoking.
- Lipitor has been extensively studied with over 17 years of research. And Lipitor is backed by over 400 ongoing or completed clinical studies.

**IMPORTANT SAFETY INFORMATION:**

LIPITOR is not for everyone. It is not for those with liver problems. And it is not for women who are nursing, pregnant or may become pregnant.

If you take LIPITOR, tell your doctor if you feel any new muscle pain or weakness. This could be a sign of rare but serious muscle side effects. Tell your doctor about all medications you take. This may help avoid serious drug interactions. Your doctor should do blood tests to check your liver function before and during treatment and may adjust your dose.

Common side effects are diarrhea, upset stomach, muscle and joint pain, and changes in some blood tests.

**INDICATION:**

LIPITOR is a prescription medicine that is used along with a low-fat diet. It lowers the LDL ("bad" cholesterol) and triglycerides in your blood. It can raise your HDL ("good" cholesterol) as well. LIPITOR can lower the risk for heart attack, stroke, certain types of heart surgery, and chest pain in patients who have heart disease or risk factors for heart disease such as age, smoking, high blood pressure, low HDL, or family history of early heart disease.

LIPITOR can lower the risk for heart attack or stroke in patients with diabetes and risk factors such as diabetic eye or kidney problems, smoking, or high blood pressure.

*Please see additional important information on next page.*



**LIPITOR.**  
atorvastatin calcium  
tablets



Have a heart to heart with your doctor about your risk. And about Lipitor.

Call 1-888-LIPITOR (1-888-547-4867) or visit [www.lipitor.com/john](http://www.lipitor.com/john)

You are encouraged to report negative side effects of prescription drugs to the FDA.

Visit [www.fda.gov/medwatch](http://www.fda.gov/medwatch) or call 1-800-FDA-1088.

*With menopause,  
there's a time to  
embrace change.*

*And a time  
to let go.*

**Another Pearl of Wisdom from PREMARIN Vaginal Cream.** While you use it, it actively restores vaginal tissue to help relieve vaginal dryness and painful intercourse. If you've gone through menopause and are experiencing vaginal dryness and discomfort, you're lacking the natural lubrication that works beyond the surface. Menopause can cause changes to the vaginal tissues, causing uncomfortable symptoms. PREMARIN Vaginal Cream can treat the underlying cause of these symptoms by restoring the tissues themselves, thereby providing natural lubrication. And you don't need to keep using PREMARIN Vaginal Cream after treatment.

## Important Safety Information

What is the most important information I should know about PREMARIN Vaginal Cream (an estrogen therapy)?

- Using estrogen alone may increase your chances of getting cancer of the uterus (womb). Report any unusual vaginal bleeding right away while you are using PREMARIN Vaginal Cream. Vaginal bleeding after menopause may be a warning sign of cancer of the uterus (womb). Your healthcare provider should check any unusual vaginal bleeding to find the cause.
- Do not use estrogen alone to prevent heart disease, heart attacks, strokes or dementia (decline in brain function).
- Using estrogen alone may increase your chances of getting strokes or blood clots.
- Using estrogen alone may increase your chance of getting dementia, based on a study of women 65 years or older.
- Do not use estrogens with progestins to prevent heart disease, heart attacks or dementia.
- Using estrogens with progestins may increase your chances of getting heart attacks, strokes, breast cancer, or blood clots.
- Using estrogens with progestins may increase your chance of getting dementia, based on a study of women 65 years or older.
- You and your healthcare provider should talk regularly about whether you still need treatment with PREMARIN Vaginal Cream.

PREMARIN Vaginal Cream is used after menopause, for the vaginal dryness, itching and burning that can occur after menopause caused by these changes.

It should not be used if you have unusual vaginal bleeding, cancer of the uterus, or a history of blood clots or liver problems. Do not take any of its ingredients. If you may be pregnant, stop using PREMARIN Vaginal Cream. Do not use PREMARIN Vaginal Cream if you are allergic to any of its ingredients. See the PREMARIN Vaginal Cream package insert for more information.

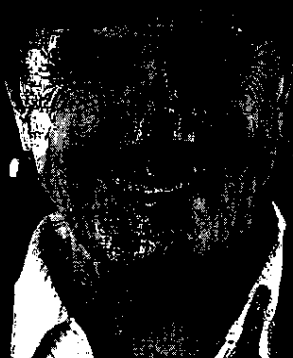
For more patient information on PREMARIN Vaginal Cream, call 1-800-441-4444 or visit [www.premarin.com](http://www.premarin.com). PREMARIN Vaginal Cream is a prescription drug. Use only as directed.

PREMARIN Vaginal Cream is a registered trademark of Wyeth. PREMARIN Vaginal Cream is a registered trademark of Wyeth. PREMARIN Vaginal Cream is a registered trademark of Wyeth.



# Ready to Rethink your treatment for osteoporosis?

I did.  
I asked about **Reclast**.



Reclast is a prescription medicine used to treat postmenopausal osteoporosis. It is given through an IV infusion. Reclast is a bisphosphonate like Fosamax, Actonel and Boniva. With oral bisphosphonate treatments, only a fraction of the medicine gets to the bone with each dose, so you have to take them more frequently. With Reclast, it's possible to significantly increase your bone mass without taking weekly or monthly osteoporosis pills. Reclast is the only once-yearly osteoporosis treatment, and is given through an IV by a doctor or nurse for at least 15 minutes.

## How Reclast

Reclast is a bisphosphonate like Fosamax,<sup>†</sup> Actonel<sup>®</sup> and Boniva<sup>®</sup>. With oral bisphosphonate treatments, only a fraction of the medicine gets to the bone with each dose, so you have to take them more frequently.

With Reclast, it's possible to significantly increase your bone mass without taking weekly or monthly osteoporosis pills. Reclast is the only once-yearly osteoporosis treatment, and is given through an IV by a doctor or nurse for at least 15 minutes.

## How it works

One annual dose, along with daily calcium and vitamin D, helps to increase bone density, protecting and strengthening your bones.

Reclast is given through an IV. It bypasses your stomach to go directly through the bloodstream to the bones, fortifying them and making them stronger for an entire year.

## What to expect

The benefits of Reclast last for a year. Most common side effects don't. The most common side effects include flu-like symptoms, fever, muscle or joint pain, headache, nausea, vomiting and diarrhea. Most occur within 1–3 days of treatment and can last up to 7–14 days. If you've taken oral bisphosphonates in the past, you are less likely to experience side effects. Taking a mild pain reliever like acetaminophen up to 3 days after treatment may reduce these symptoms.

## The Cost

The average cost of a Reclast treatment is under \$60 if you've already paid your yearly deductible. That's less than the annual cost of other drugs — including generics! As Reclast is an infusion, costs are covered by Medicare Part B, not Medicare Part D.

## Talk to Your Doctor

Only your doctor can determine if Reclast is right for you. Ask your doctor about Reclast today.

Prescription Reclast is approved to treat postmenopausal osteoporosis.

## Important Safety Information:

You should not take Reclast if you're on Zometa<sup>™</sup> (zoledronic acid) Injection because it contains the same active ingredient. Additionally, you should not take Reclast if you are pregnant, plan to become pregnant, you are nursing, have low blood calcium, kidney problems, or are allergic to Reclast.

It's important to drink fluids before getting Reclast to help prevent kidney problems. Tell your doctor if you have dental problems because rarely, problems with the jaw have been reported with Reclast. Discuss all medicines you are taking, including prescription and non-prescription drugs, vitamins and herbal supplements. If you develop severe bone, joint, or muscle pain, numbness, tingling or muscle spasms, contact your doctor.

OVER ONE MILLION  
INFUSIONS WORLDWIDE

**Reclast<sup>®</sup>**  
(zoledronic acid) injection  
5 mg/100 mL for infusion

Please see next page for a brief summary of Important Product Information.

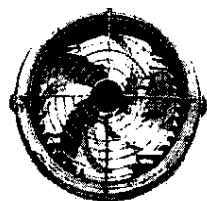
1-866-Reclast [www.reclast.com](http://www.reclast.com)

You are encouraged to report negative side effects of prescription drugs to the FDA. Visit [www.fda.gov/medwatch](http://www.fda.gov/medwatch) or call 1-800-FDA-1088. If you don't have prescription coverage and can't afford your medicines, log onto [www.pap.novartis.com](http://www.pap.novartis.com) or call 1-800-245-5356.

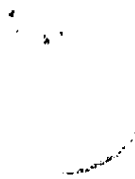
FOSAMAX is a registered trademark of Merck Sharp & Dohme Corp., a subsidiary of Merck & Co., Inc. ACTONEL is a registered trademark of Procter & Gamble Pharmaceuticals, Inc. BONIVA is a registered trademark of Roche Therapeutics Inc.

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# EVOLUTION OF ESTROGEN THERAPY



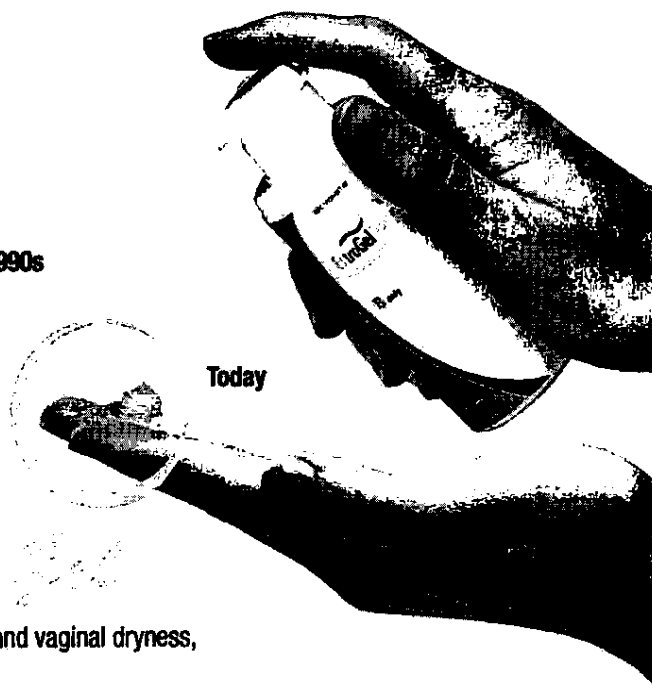
1960s



1970s



1990s



Today

## A Modern Solution to Managing Menopause:

Today there's EstroGel for managing your hot flashes; night sweats; and vaginal dryness, itching, and burning with a low dose of estrogen.<sup>1</sup>

Plant based and bio-identical to the estrogen your body makes naturally<sup>1-3</sup>

FDA approved; manufactured under stringent FDA specifications to meet consistent quality standards

Unlike oral therapies, it is delivered directly to your bloodstream without first going through the liver<sup>4</sup>

— Can be administered at a lower dose than estrogen pills<sup>4</sup>

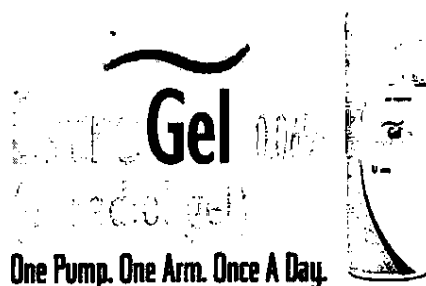
Unlike a patch, it contains no adhesive that may irritate the skin

Easy to use, easy to apply, and fits comfortably into active women's lives

Talk with your doctor today about a prescription for EstroGel, the #1 estrogen-only product in Europe.<sup>2</sup>

Visit our web site for money-saving coupons.

[www.estrogel.com](http://www.estrogel.com)



One Pump. One Arm. Once A Day.

Please see Patient Information and boxed warning on the following page.

### WHAT IS THE MOST IMPORTANT INFORMATION I SHOULD KNOW ABOUT EstroGel (AN ESTROGEN HORMONE)?

Estrogens increase the chance of getting cancer of the uterus (womb). Report any unusual vaginal bleeding right away while you are using EstroGel. Vaginal bleeding after menopause may be a warning sign of cancer of the uterus (womb). Your healthcare provider should check any unusual vaginal bleeding to find the cause.

Do not use estrogens with or without progestins to prevent heart disease, heart attacks, strokes, or dementia. Using estrogens with or without progestins may increase your chance of getting heart attacks, strokes, breast cancer, and blood clots.

Using estrogens, with or without progestins, may increase your risk of dementia, based on a study of women age 65 or older.

Do not start using EstroGel if you have unusual vaginal bleeding, currently have or have had certain cancers, had a stroke or heart attack in the past year, currently have or have had blood clots, currently have or have had liver problems, are allergic to EstroGel or any of its ingredients, or think you may be pregnant.

Common side effects of estrogens include headache, breast pain, irregular vaginal bleeding or spotting, stomach/abdominal cramps, bloating, nausea, vomiting, hair loss, fluid retention, and vaginal yeast infection.

You and your healthcare provider should talk regularly about whether you still need treatment with EstroGel.

You are encouraged to report negative side effects of prescription drugs to the FDA. Visit [www.fda.gov/medwatch](http://www.fda.gov/medwatch), or call 1-800-FDA-1088.

ASCEND  
THERAPEUTICS

# ZETIA Helps Fight Cholesterol Differently.

## **ZETIA helps lower cholesterol differently.**

Statins, the most common cholesterol-lowering medicines, are a good option. They work mainly with the liver. ZETIA works in the digestive tract, as do some other cholesterol-lowering medicines.

But ZETIA is unique in the way it helps block the absorption of cholesterol that comes from food.

**Unlike some statins, ZETIA has not been shown to prevent heart disease or heart attacks.**

A healthy diet and exercise are important, but sometimes they're not enough to get your cholesterol where it needs to be. ZETIA can complement your efforts. When added to a healthy diet, ZETIA can lower bad cholesterol (LDL) by an average of 18%. Individual results may vary.

## **Important Risk Information About ZETIA:**

ZETIA is a prescription medicine and should not be taken by people who are allergic to any of its ingredients. If you have ever had liver problems, are nursing or pregnant or may become pregnant, a doctor will decide if ZETIA alone is right for you.

Unexplained muscle pain or weakness could be a sign

of a rare but serious side effect and should be reported to your doctor right away. In clinical studies, patients reported few side effects while taking ZETIA. These included diarrhea, joint pains, and tiredness.

You are encouraged to report negative side effects of prescription drugs to the FDA. Visit [www.fda.gov/medwatch](http://www.fda.gov/medwatch),

or call 1-800-FDA-1088.

**Please read the more detailed information about ZETIA on the adjacent page.** For more information, call 1-800-98-ZETIA or visit [zetia.com](http://zetia.com).

ZETIA works in the digestive tract,  
not the liver, to help block  
the absorption of cholesterol  
that comes from food.



**Zetia**  
(ezetimibe) Tablets

**A different way to help fight cholesterol**

Ask your doctor if ZETIA is right for you.



To find out if you qualify, call 1-800-347-7503.

**MSD** Schering-Plough Pharmaceuticals

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ZETIA is a registered trademark of MSD Singapore Company, LLC.

## About CIMZIA<sup>®</sup> (certolizumab pegol)

### What is the most important information I should know about CIMZIA?

CIMZIA is a prescription medicine that affects your immune system. CIMZIA can lower the ability of the immune system to fight infections. Serious infections have happened in patients taking CIMZIA, including tuberculosis (TB) and infections caused by viruses, fungi, or bacteria that have spread throughout the body. Some patients have died from these infections. Your doctor should test you for TB before starting CIMZIA. Your doctor should monitor you closely for signs and symptoms of TB during your treatment with CIMZIA.

### Certain Types of Cancer

There have been cases of unusual cancers in children and teenage patients using TNF-blocking agents. CIMZIA is not approved for use in pediatric patients. For people taking TNF-blocker medicines, including CIMZIA, the chances for getting lymphoma or other cancers may increase. People with RA, especially more serious RA, may have a higher chance for getting a kind of cancer called lymphoma.

### Before starting CIMZIA, tell your doctor if you

- Think you have an infection. You should not start taking CIMZIA if you have any kind of infection, are being treated for an infection or have signs of an infection such as fever, cough or flu-like symptoms or if you get a lot of infections or have infections that keep coming back.
- Have any open cuts or sores
- Have diabetes or HIV
- Have TB, or have been in close contact with someone with TB
- Were born in, lived in, or traveled to countries where there is more risk of getting TB. Ask your doctor if you are not sure.
- Live or lived in certain parts of country (such as the Ohio and Mississippi River valleys) where there is an increased risk for getting certain kinds of fungal infections (histoplasmosis, coccidioidomycosis, blastomycosis). These infections may develop or become severe if you take CIMZIA. If you do not know if you have lived in these types of areas, ask your doctor.
- Have or have had hepatitis B
- Have or have had any type of cancer
- Have congestive heart failure

- Have seizures, any numbness or tingling, or a disease that affects your nervous system such as multiple sclerosis
- Are scheduled to receive a vaccine. Do not receive a live vaccine while taking CIMZIA
- Are pregnant, planning to become pregnant, or breastfeeding. CIMZIA has not been studied in pregnant or nursing women.
- Especially tell your doctor if you take: Kineret<sup>®</sup> (anakinra), Orencia<sup>®</sup> (abatacept), Rituxan<sup>®</sup> (rituximab), Tysabri<sup>®</sup> (natalizumab), or another TNF blocker. You have a higher chance for serious infections when taking CIMZIA with these medicines. You should not take CIMZIA while you take one of these medicines.

After starting CIMZIA, if you get an infection, any sign of an infection including a fever, cough, flu-like symptoms, or have open cuts or sores on your body, call your doctor right away. CIMZIA can make you more likely to get infections or make any infection that you may have worse.

### What are the possible side effects of CIMZIA? CIMZIA can cause serious side effects including:

**Heart Failure** including new heart failure or worsening of heart failure you already have; **Nervous System Problems** such as Multiple Sclerosis, seizures, or inflammation of the nerves of the eyes; **Allergic Reactions**. Signs of an allergic reaction include a skin rash, swollen face, or trouble breathing; **Hepatitis B virus reactivation** in patients who carry the virus in their blood. In some cases, patients have died as a result of hepatitis B virus being reactivated. Your doctor should monitor you carefully during treatment with CIMZIA if you carry the hepatitis B virus in your blood; **Blood Problems**. Your body may not make enough of the blood cells that help fight infections or help stop bleeding; **Immune reactions** including a lupus-like syndrome. Symptoms include shortness of breath, joint pain, or a rash on the cheeks or arms that worsens with sun exposure.

**Call your doctor right away if you develop any of the above side effects or symptoms.**

**The most common side effects of CIMZIA are:** upper respiratory infections (flu, cold), rash, and urinary tract infections (bladder infections).

Other side effects have happened in some people including new psoriasis or worsening of psoriasis you already have and injection site reactions.

You are encouraged to report negative side effects to FDA. Visit [www.fda.gov/medwatch](http://www.fda.gov/medwatch), or call 1-800-FDA-1088.

Please see Brief Summary on following pages.

For treatment of adults with moderate to severe Rheumatoid Arthritis

**Cimzia. RA relief that can help  
you get a good grip on life.**

Cimzia has been clinically proven vs. placebo to reduce RA pain, stiffness and fatigue in as little as 1-2 weeks for some patients. The majority experienced RA signs and symptoms improvement within 6 months which lasted through 1 year and prevented further joint damage. Your results may vary. Based on what you and your doctor decide, Cimzia can be injected every 2 or 4 weeks after initial dosing.

Ask your doctor about the benefits and risks of Cimzia.

Pre-filled syringe designed for ease and comfort in partnership with **OXO GOODGRIPS**

Please read the Important Safety Information on the adjacent page.



**cimzia**  
(certolizumab pegol)

Visit [cimzia.com/RA](http://cimzia.com/RA)  
Call 1-877-793-6410



carefully during treatment with CIMZIA if you carry the hepatitis B virus in your blood. Tell your doctor if you have any of the following symptoms:

- feel unwell
  - tiredness (fatigue)
  - poor appetite
  - fever, skin rash, or joint pain
- **Blood Problems.** Your body may not make enough of the blood cells that help fight infections or help stop bleeding. Symptoms include a fever that doesn't go away, bruising or bleeding very easily, or looking very pale.
  - **Immune reactions including a lupus-like syndrome.** Symptoms include shortness of breath, joint pain, or a rash on the cheeks or arms that worsens with sun exposure.

**Call your doctor right away if you develop any of the above side effects or symptoms.**

**The most common side effects in people taking CIMZIA are:**

- upper respiratory infections (flu, cold)
- rash
- urinary tract infections (bladder infections)

Other side effects with CIMZIA include:

- **Psoriasis.** Some people using CIMZIA had new psoriasis or worsening of psoriasis they already had. Tell your doctor if you develop red scaly patches or raised bumps that are filled with pus. Your doctor may decide to stop your treatment with CIMZIA.
- **Injection site reactions.** Redness, rash, swelling, itching or bruising can happen in some people. These symptoms will usually go away within a few days. If you have pain, redness, or swelling around the injection site that doesn't go away within a few days or gets worse, call your doctor right away.

Tell your doctor about any side effect that bothers you or does not go away.

These are not all of the side effects with CIMZIA. Ask your doctor or pharmacist for more information.

**Call your doctor for medical advice about side effects. You may report side effects to FDA at 1-800-FDA-1088.**

#### **General information about CIMZIA**

Medicines are sometimes prescribed for purposes that are not mentioned in Medication Guides. Do not use CIMZIA for a condition for which it was not prescribed. Do not give CIMZIA to other people, even if they have the same condition. It may harm them.

This brief summary summarizes the most important information about CIMZIA. If you would like more information, talk with your doctor. You can ask your doctor or pharmacist for information about CIMZIA that is written for health professionals.

For more information go to [www.CIMZIA.com](http://www.CIMZIA.com) or call 1-866-4CIMZIA (424-6942).

**Always keep CIMZIA, injection supplies, puncture-proof container, and all other medicines out of the reach of children.**

#### **What are the ingredients in CIMZIA?**

**CIMZIA lyophilized powder:** Active ingredient: certolizumab pegol. Inactive ingredients: sucrose, lactic acid, polysorbate. The pack contains Water for Injection, for reconstitution of the lyophilized powder.

**CIMZIA prefilled syringe:** Active ingredient: certolizumab pegol. Inactive ingredients: sodium acetate, sodium chloride, and Water for Injection.

CIMZIA has no preservatives.

Product developed and manufactured for:

UCB, Inc., 1950 Lake Park Drive, Smyrna, GA 30080 U.S. License No 1736



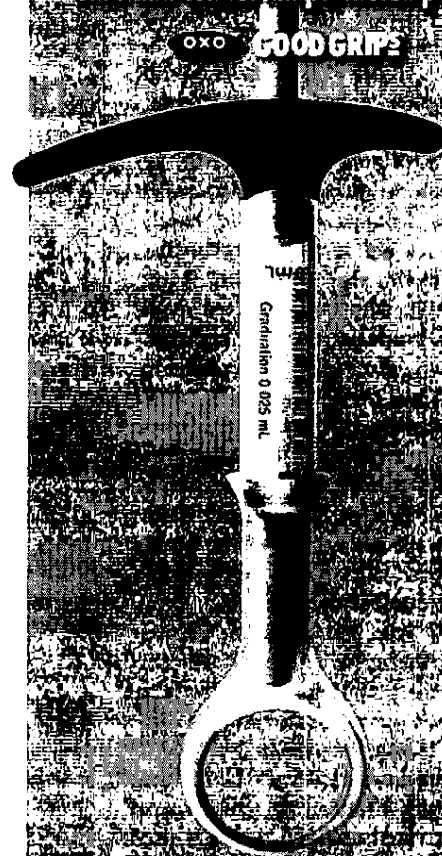
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CCD123-1209 4E

## Getting a on RA can start with this syringe.

Guided by input from people with RA,  
the CIMZIA syringe was designed for  
ease and comfort in partnership with



You may save up to \$500 on each CIMZIA prescription if you qualify. Go to [cimzia.com/RA](http://cimzia.com/RA)

  
**cimzia**  
(certolizumab pegol)

For moderate to severe RA adults.

Anaphylaxis or serious allergic reactions may occur.  
Hypersensitivity reactions have been reported rarely  
following CIMZIA administration.

Please see Brief Summary on previous page.

## EXHIBIT C



# DEAL WITH WHAT

WITH EVERY AGE COMES RESPONSIBILITY. IMPORTANT SAFETY INFORMATION BELOW.

We know that no medicine is for everyone. Don't take VIAGRA if you take nitrates, often prescribed for chest pain, as this may cause a sudden unsafe drop in blood pressure.

Talk with your doctor first. Make sure your heart is healthy enough to have sex. If you have chest pain, nausea, or other discomforts during sex, seek medical help right away.

In the rare event of an erection lasting more than four hours, seek immediate medical help to avoid long-term injury.

In rare instances, men who take PDE5 inhibitors (oral erectile dysfunction medicines, including VIAGRA) reported a sudden decrease or loss of vision, or sudden decrease or loss of hearing. It is not possible to determine whether these events are related directly to these medicines or to other factors. If you experience any of these symptoms, stop taking PDE5 inhibitors, including VIAGRA, and call a doctor right away.

# WITH IT MEN DO.

## YOU FACE THINGS HEAD ON. WHY WOULD THIS BE ANY DIFFERENT?

More than half of all men over 40 have some degree of erectile dysfunction (ED).<sup>\*</sup>  
If you're one of them, ask your doctor about VIAGRA. It's America's most prescribed ED treatment.

For more information go to [viagra.com](http://viagra.com) or call 1-888-484-2472 (1-888-4VIAGRA).

## THIS IS THE AGE OF TAKING ACTION.

**VIAGRA**  
(sildenafil citrate)

The most common side effects of VIAGRA are headache, facial flushing, and upset stomach. Less common are bluish or blurred vision, or being sensitive to light. These may occur for a brief time.

VIAGRA does not protect against sexually transmitted diseases including HIV.

Please see Important Facts for VIAGRA on the following page or visit [viagra.com](http://viagra.com) for full prescribing information.

<sup>\*</sup>Data taken from the *Massachusetts Male Aging Study*. Of 1,290 respondents, 52% stated that they had some degree of ED.

You are encouraged to report negative side effects of prescription drugs to the FDA. Visit [www.FDA.gov/medwatch](http://www.FDA.gov/medwatch) or call 1-800-FDA-1088.

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Lilly,

## EXHIBIT D

**"Talk about a  
wake-up call.  
I had a heart attack  
at 57."**

-John E.  
Lafayette, CA  
Heart attack: 8/16/2007



**"I should have been doing more for my high cholesterol.  
I learned the hard way. Now I trust my heart to Lipitor."  
Talk to your doctor about your risk and about Lipitor.**

When diet and exercise are not enough, adding Lipitor may help. Lipitor is FDA-approved to reduce the risk of heart attack and stroke in patients who have heart disease or risk factors for heart disease, including family history of early heart disease, high blood pressure, low good cholesterol, age and smoking.

Lipitor has been extensively studied with over 18 years of research. And Lipitor is backed by over 400 ongoing or completed clinical studies.

**IMPORTANT SAFETY INFORMATION:**

LIPITOR is not for everyone. It is not for those with liver problems. And it is not for women who are nursing, pregnant or may become pregnant.

If you take LIPITOR, tell your doctor if you feel any new muscle pain or weakness. This could be a sign of rare but serious muscle side effects. Tell your doctor about all medications you take. This may help avoid serious drug interactions. Your doctor should do blood tests to check your liver function before and during treatment and may adjust your dose.

Common side effects are diarrhea, upset stomach, muscle and joint pain, and changes in some blood tests.

**INDICATION:**

LIPITOR is a prescription medicine that is used along with a low-fat diet. It lowers the LDL ("bad" cholesterol) and triglycerides in your blood. It can raise your HDL ("good" cholesterol) as well. LIPITOR can lower the risk for heart attack, stroke, certain types of heart surgery, and chest pain in patients who have heart disease or risk factors for heart disease such as age, smoking, high blood pressure, low HDL, or family history of early heart disease.

LIPITOR can lower the risk for heart attack or stroke in patients with diabetes and risk factors such as diabetic eye or kidney problems, smoking, or high blood pressure.

*Please see additional important information on next page.*



**LIPITOR.**  
atorvastatin calcium  
tablets



Have a heart to heart with your doctor about your risk. And about Lipitor.

Call 1-888-LIPITOR (1-888-547-4867) or visit [www.lipitor.com/john](http://www.lipitor.com/john)

*You are encouraged to report negative side effects of prescription drugs to the FDA.*

*Visit [www.fda.gov/medwatch](http://www.fda.gov/medwatch) or call 1-800-FDA-1088.*

### **CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing **DECLARATION OF BETH GOLDMAN IN SUPPORT OF BAYER HEALTHCARE LLC'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT** is being served upon counsel for Applicant by First Class Mail on this 19 day of November 2010, by placing the same in an envelope addressed as follows:

Christina M. Licursi  
Wolf, Greenfield & Sacks, P.C.  
Federal Reserve Plaza, 600 Atlantic Avenue  
Boston, MA 02210-2206

By: \_\_\_\_\_

Beth Goldman